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# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 553.

ROBERT SAWYER AND ARTHUR ADAMS, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

FILED JANUARY 18, 1906.

(20055.)

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1 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

*The President of the United States to the honorable the Judges of the Circuit Court of the United States for the Eastern District of North Carolina, in the Fourth Circuit, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, in a cause entitled United States by indictment against Robert Sawyer and Arthur Adams, a manifest error hath happened, to the great damage of the said Robert Sawyer and Arthur Adams, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States at Washington, together with this writ, so that you have the same at the city of Washington on the 15th day of January next, in the said Supreme Court of the United States, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 21st day of December, in the year of our Lord one thousand nine hundred and five.

[SEAL.] SAMUEL P. COLLIER,
*Clerk of the Circuit Court of the United States*
*for the Eastern District of North Carolina,*
*in the Fourth Circuit, at Wilmington.*

Allowed by:
THOS. R. PURNELL,
*United States District Judge holding the Circuit Court.*

2 *Return of Circuit Court on writ of error.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT of NORTH CAROLINA. IN THE FOURTH CIRCUIT, AT WILMINGTON, *ss:*

And now here, the judge of the District Court of the United States for the said Eastern District of North Carolina, presiding and holding said Circuit Court, makes return of this writ by annexing hereto and sending herewith, under the seal of the said Circuit Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, Samuel P. Collier, Clerk of said Circuit Court of the United States, in and for the Eastern District of North Carolina,

in the Fourth Circuit, at Wilmington, have hereto set my hand and the seal of said court, this twenty-third day of December, A. D. nineteen hundred and five.

[SEAL.] SAMUEL P. COLLIER, *Clerk.*

3 *Transcript of record.*

United States of America, Eastern District of North Carolina. In the Circuit Court, Fourth Circuit, at Wilmington.

At a Circuit Court of the United States for the Eastern District of North Carolina, begun and holden at Wilmington, within and for the Eastern District of North Carolina, in said Fourth Circuit, on Monday, the thirtieth day of October, in the year of our Lord nineteen hundred and five, before the Honorable Thomas R. Purnell, district judge, presiding and holding said court.

On the sixteenth day of September, A. D. 1905, it was ordered by the court that the regular venire issue for fifty jurors, as follows:

*Regular venire.*

United States of America, Eastern District of North Carolina. In the District Court at Wilmington.

*The President of the United States of America, to the Marshal of the Eastern District of North Carolina, greeting:*

You are hereby commanded to summon the following-named jurors to attend on the first Monday after the fourth Monday in October (October 30th, 1905) next, at 10.00 o'clock a. m. of that day at the United States court room in the city of Wilmington, in said district. They having been regularly drawn according to law to serve as jurors in the Circuit and District courts, for the fall term, 1905, to wit:

| | No. | Name. | Post-office. | County. |
|---|---|---|---|---|
| * | 1.. | G. F. Allen | Brompton | Bladen. |
| * | 2.. | J. D. McKeithan | Clarkton | " |
| * | 3.. | Best Matthew | Council's Station | " |
| * | 4.. | D. J. Burney | Clarkton | " |
| * | 5.. | J. B. Bryan | Tar Heel | " |
| * | 6.. | H. G. Hewett | Shallotte | Brunswick. |
| * | 7.. | Monroe Hickman | Funston | " |
| * | 8.. | F. M. Moore | Phoenix | " |
| * | 9.. | Richard Dosher | Southport | " |
| * | 10.. | Daniel R. Johnson | Winnebow | " |
| * | 11.. | Haynes Hinson | Vineland | Columbus. |
| * | 12.. | K. F. Long | Chadbourn | " |
| * | 13.. | H. N. Wayne | Hallsboro | " |
| * | 14.. | John R. Baldwin | Clarkton | " |
| * | 15.. | C. E. Bullard | Fayetteville | Cumberland. |
| * | 16.. | James Faircloth | Cedar Creek | " |
| * | 17.. | John D. Williams (col.) | Fayetteville | " |
| * | 18.. | W. M. McQueen | Hope Mills | " |
| * | 19.. | W. H. Middleton | Warsaw | Duplia. |
| 4 * | 20.. | George Albritton | Calypso | Duplin |
| * | 21.. | D. C. Potter | Albertson | " |
| * | 22 | A. F. Williams | Kenansville | " |

| | No. | Name. | Post-office. | County. |
|---|---|---|---|---|
| * | 23.. | J. Allen Taylor..... | Wilmington..... | New Hanover. |
| * | 24.. | Edgar G. Parmelee..... | " | " |
| * | 25.. | Norwood Huske..... | " | " |
| * | 26.. | George W. Kidder..... | " | " |
| * | 27.. | J. W. Branch..... | " | " |
| * | 28.. | G. Herbert Johnson.... | " | " |
| * | 29.. | D. J. Rooks..... | South Washington... | Pender. |
| * | 30.. | W. W. Larkins..... | Long Creek..... | " |
| * | 31.. | A. M. Bowden..... | Burgaw..... | " |
| * | 32.. | A. W. Garriss..... | South Washington... | " |
| Dead. | 33.. | E. W. Ward..... | Long Creek..... | " |
| * | 34.. | Henry C. Wall..... | Rockingham..... | Richmond. |
| * | 35.. | Bascolm Chappel..... | Ellerbe Springs..... | " |
| * | 36.. | Billy Watkins..... | Rockingham..... | " |
| * | 37.. | D. G. Cameron..... | Hamlet..... | " |
| * | 38.. | John Leach..... | Maxton..... | Robeson. |
| * | 39.. | W. A. Wilkes..... | " | " |
| * | 40.. | W. O. Edmund..... | Lumberton..... | " |
| * | 41.. | I. G. Whitlock..... | Maxton (R. F. D. 1).. | " |
| | 42.. | W. E. Barden..... | Clinton (R. F. D. 1).. | Sampson. |
| * | 43.. | A. D. Lockerman..... | Huntley..... | " |
| * | 44.. | W. J. Pugh..... | Clinton..... | " |
| * | 45.. | David King..... | Faison..... | " |
| * | 46.. | J. S. McDuffie..... | Laurinburg..... | Scotland. |
| * | 47.. | H. C. Smith..... | Old Hundred..... | " |
| * | 48.. | R. D. Gibson..... | Gibson's..... .... | Scotland. |
| * | 49.. | J. A. McGregor..... | Laurinburg..... | " |
| * | 50.. | Robert James..... | Maready..... | Duplin. |

Herein fail not and have you then and there this writ.

Witness, the honorable Thomas R. Purnell, judge of the said District Court and seal thereof, at Wilmington, in said district, this 16th day of September, A. D. 1905, and in the 130th year of the Independence of the United States of America.

[SEAL] SAMUEL P. COLLIER, *Clerk*,
By JAMES K. COLLIER, *Deputy Clerk*.

WASHINGTON CATLETT,
*Jury Commissioner*.

*Marshal's return to regular venire for fall term 1905.*

(Filed October 31st, 1905.)

"Reed and executed Sept. 19, 1905, by mailing a notice to each of the jurors named herein. Those marked thus (*) have signed their names on the notices & returned them to this office, thus accepting service."

H. C. DOCKERY, *U. S. M.*,
By J. T. SHARP, *D. M.*

5 United States of America. In the Circuit Court of the United States for the Eastern District of North Carolina, in the Fourth Circuit, at Wilmington. Fall term, 1905.

At the regular fall term of the Circuit and District Courts of the United States, for the Eastern District of North Carolina, in the Fourth Circuit, begun, opened and held in the United States court room in the city of Wilmington, N. C., on the thirtieth day of October, A. D., 1905. His honor Thomas R. Purnell, district judge of the Eastern District of North Carolina, being present, presiding and holding said courts.

Among the proceedings had on the thirty-first day of October, A. D. 1905, were the following, to wit:

The venire facias is returned by the United States marshal, with his return thereon of service, by summons, of the jurors for the term, as drawn by Washington Catlett, jury commissioner, and the clerk, Samuel P. Collier.

E. W. Ward, a juror drawn from Long Creek, Pender County, is reported dead by the United States marshal.

J. Allen Taylor and George W. Kidder, drawn from Wilmington, New Hanover County, were excused by the judge.

It is ordered by the court that eighteen from the venire be drawn to serve as grand jurors—when the following were duly drawn, sworn, and afterwards charged by his honor:

| No. | Name. | Post office. | County. |
|---|---|---|---|
| 1 | Daniel R. Johnson | Winnabow | Brunswick. |
| 2 | Haynes S. Hinson | Vineland | Columbus. |
| 3 | K. F. Long | Chadbourn | " |
| 4 | C. E. Ballard | Fayetteville | Cumberland. |
| 5 | James Faircloth | Cedar Creek | " |
| 6 | John D. Williams | Fayetteville | " |
| 7 | W. M. McQueen | Hope Mills | " |
| 8 | W. H. Middleton | Warsaw | Duplin. |
| 9 | D. C. Potter | Albertson | " |
| 10 | A. F. Williams | Kenansville | " |
| 11 | Norwood Huske | Wilmington | New Hanover. |
| 12 | A. W. Garriss | South Washington | Pender. |
| 13 | L. G. Whitlock | Maxton | Robeson. |
| 14 | A. D. Lockerman | Huntley | Sampson. |
| 15 | J. S. McDuffie | Laurinburg | Scotland. |
| 16 | H. C. Smith | Old Hundred | " |
| 17 | R. D. Gibson | Gibsons | " |
| 18 | J. A. McGregor | Laurinburg | " |

3 It is ordered by the court that A. F. Williams, of Kenansville, Duplin County, be, and he is hereby, appointed and sworn as foreman of the grand jury for this term. After which the remaining members of the grand jury are each sworn and they retire to their deliberations.

By order of the court, the remaining jurors are sworn and subdivided into petit juries, numbers "one" and "two," leaving five extra jurors.

And afterwards at the said session of said court, to wit, on Wednesday, November the first, 1905, the following additional proceedings are had in said cause, to wit:

The grand jury come into court in a body and through their foreman present a true bill, charging Robert Sawyer and Arthur Adams with "murder on the high seas." Whereupon it was ordered by the court that the grand jury be polled, when each grand juror for himself answered "aye" as to this being a true bill, in form as follows:

*Bill of Indictment.*

UNITED STATES }
*vs.* } No. 126, Criminal Docket.
ROBERT SAWYER AND ARTHUR ADAMS. }

United States of America, Eastern District of North Carolina, Wilmington Division.

Indictment, murder.

In the District Court of the United States in and for the Eastern District of the United States, at the fall term thereof, A. D. 1905.

A true bill.

A. F. WILLIAMS,
*Foreman.*

Filed Nov. 1, '05.

S. P. COLLIER,
*Clerk.*

HARRY SKINNER,
*U. S. Attorney.*

The grand jurors of the United States, impanneled, sworn, and charged at the term aforesaid, of the court aforesaid, on their oaths present: That Robert Sawyer, Arthur Adams on the 28th day of October, 1905, with force and arms on the high seas, and within the jurisdiction of this court, and within the admiralty and maritime jurisdiction of the
7 United States, in and on board of an American vessel, the schooner "Harry A. Berwin," belonging to a citizen or citizens of said United States whose name or names are to the grand jurors unknown, did with a certain instrument or weapon (the character and name of which were to the grand jurors unknown) then and there held in the hands of one of the defendants (but of which particular one was to the grand jurors unknown) then and there piratically, wilfully, feloniously, and with malice aforethought did shoot, strike and beat the said E. R. Rumill, captain; John T. Hall, mate; John Falbe, cook; C. L. Smith, engineer; John S. Coakley, seaman, then and there giving the said E. R. Rumill, John T. Hall, John Falbe, C. L. Smith, John S. Coakley several serious, dangerous, and mortal wounds, and did then and there, to wit, at the time and place last above mentioned, him the E. R. Rumill, John T. Hall, John Falbe, C. L. Smith, John S. Coakley, cast and throw from and out of said vessel into the sea, and plunge, sink, and drown him the said E. R. Rumill, John T. Hall, John Falbe, C. L.

Smith, John S. Coakley, in the sea aforesaid, of which mortal wounds, casting and throwing and plunging, sinking and drowning the said E. R. Rumill, John T. Hall, John Falbe, C. L. Smith, John S. Coakley, in and upon the high seas aforesaid, out of the jurisdiction of any particular State of the United States of America, and then instantly died.

And the grand jurors aforesaid, upon their oaths aforesaid, do say that by reason of the casting and throwing of the said E. R. Rumill, John T. Hall, John Falbe, C. L. Smith, John S. Coakley in the sea as aforesaid, they can not describe the said mortal wounds or the character and nature of the said weapon or instrument. And so the grand jurors, upon their oaths aforesaid, do say that the said E. R. Rumill, John T. Hall, John Falbe, C. L. Smith, John S. Coakley, at the time and place aforesaid, upon the high seas aforesaid, out of the jurisdiction of any particular State of the United States of America, in and upon the said American vessel, within the jurisdiction of said United States of America and of this court, in the manner and form aforesaid, piratically, wilfully, and feloniously, and with malice aforethought, did kill and murder, against the peace and dignity of the United States of America, contrary to the form of the statute in such case made and provided and against the peace
8 and dignity of the United States.

HARRY SKINNER,
*United States Attorney.*

*Motions and orders.*

And afterwards at the said session of said court, to wit, on the same day, the following additional proceedings are had in said cause, to wit:

Motion by the United States attorney that this case, with all subpœnas, recognizances of all witnesses, and other papers in connection therewith be remanded and transferred to the United States Circuit Court for the Eastern District of North Carolina for trial.

And it is so ordered by the court.

Attorney for the defendants' asks that a special venire of fifty jurors be summoned from the district to serve as jurors in this case.

Whereupon it is ordered by the court that a "special venire" of fifty names, drawn from the jury box, to be summoned from the district by the jury commissioner, Washington Catlett, and the clerk, Samuel P. Collier.

Said jurors so drawn to be and appear at the United States court room in Wilmington, the fourth day of November, A. D. 1905, 10.00 o'clock a. m. which was accordingly done in form as follows:

*Special venire for fifty jurors, to attend Saturday, Nov. 4th, 1905.*

United States of America, Eastern District of North Carolina. In the Circuit Court at Wilmington.

*The President of the United States of America to the marshal of the Eastern District of North Carolina, greeting:*

You are hereby commanded to summon the following named jurors to attend on Saturday next, the 4th day of November, A. D. 1905, at

10.00 o'clock a. m. of that day, at the United States court room in the city of Wilmington, in said district, they having been regularly drawn accordingly to law to serve as jurors in said Circuit Court
9 for the trial of Robert Sawyer and Arthur Adams, indicted for murder on the high sea, to wit:

| No. | Name. | Post-office. | County. |
|---|---|---|---|
| 1.. | H. P. Clark | Emerson | Bladen. |
| 2.. | A. A. Hilburn | Richardson | " |
| 3.. | J. C. Cromartie | Garland | " |
| 4.. | H. W. Hood | Southport | Brunswick. |
| 5.. | Ashbury Robbinson | Bivan | " |
| 6.. | Isaac Jenrette | Regan | " |
| 7.. | Walker Willette | Winnabow | " |
| 8.. | Daniel G. Hewett | Shallotte | " |
| 9.. | D. W. Hughes | Chadbourn | Columbus. |
| 10.. | H. L. Struthers | Grist | " |
| 11.. | A. G. Holmes | Councils | " |
| 12.. | J. D. Strauss | Bolton | " |
| 13.. | S. B. King | Armour | " |
| 14.. | J. A. Hinson | Fair Bluff | " |
| 15.. | A. G. Tolar | Fayetteville | Cumberland. |
| 16.. | Addison Lambert | " | " |
| 17.. | S. R. Shepherd | " | " |
| 18.. | D. Moore | Baltic | Duplin. |
| 19.. | B. L. Blackmore | Warsaw | " |
| 20.. | J. F. Shines | Baltic | " |
| 21.. | W. R. Sholar | Sloan | " |
| 22.. | B. L. Sutton | Faison | " |
| 23.. | B. B. Humphrey | Wilmington, R. F. D | New Hanover. |
| 24.. | Thomas Lossen | " | " |
| 25.. | Charles E. Hall | " | " |
| 26.. | Chadbourn | " | " |
| 27.. | Ike W. Solomon | " | " |
| 28.. | L. S. Belden | " | " |
| 29.. | D. L. Gore | " | " |
| 30.. | R. L. Durham | Burgaw | Pender. |
| 31.. | G. B. Lee | Rocky Point | " |
| 32.. | S. B. Costin | Grit | " |
| 33.. | J. M. Kelly | South Washington | " |
| 34.. | A. J. Garrison | Scotts Hill | " |
| 35.. | J. LeGrand Everett | Rockingham | Richmond. |
| 36.. | W. Rily Covington | " | " |
| 37.. | Perry Leviner | Hamlet | " |
| 38.. | John Liles | Rockingham | " |
| 39.. | Walter Murray | Barnesville | Robeson. |
| 40.. | George Bodiford | Lumberton | " |
| 41.. | M. M. Caddell | Maxton (R. F. D. No. 1) | " |
| 42.. | Erastus Cooper | Salemburg | Sampson. |
| 43.. | Allen Doughtry | Newton Grove | " |
| 44.. | W. R. McCullen | Keeners (R. F. D. No. 1) | " |
| 45.. | Valentine Rackley | Moultonville | " |
| 46.. | E. T. Britt | Newton Grove | " |
| 47.. | Westville Quick | Laurel Hill | Scotland. |
| 48.. | G. S. McMillan | Laurinburg | " |
| 49.. | W. DeB. McEachern | " | " |
| 50.. | A. H. McLauchlin | " | " |

Herein fail not and have you then and there this writ.

Witness, The honorable Thomas R. Purnell, judge of the said court, presiding, and the seal thereof, at Wilmington, in said district, this 1st

day of November, A. D. 1905, and in the 130th year of the independence of the United States of America.

(SEAL.) SAMUEL P. COLLIER,
*Clerk.*

WASHINGTON CATLETT,
*Jury Commissioner.*

10 It is further ordered by the court, that the clerk furnish a copy of the regular and special venire and a copy of bill of indictment, and any other paper in connection with this cause that may be desired by the defendants' attorney, George L. Peschau, esq.

Pursuant to the foregoing order of court, one certified copy of each bill of indictment, regular and special venire, grand and petit jurors, made out and served by the United States marshal on George L. Peschau, esq., attorney for the defendants.

At all stages of the proceedings the defendants were present and in court, and represented by their attorney.

*Motions and orders.*

And afterward at said session of said court, to wit, on Thursday the second day of November, A. D. 1905, the following additional proceedings are had in said cause, to wit:

*Marshal's return to bill of indictment.*

(Filed November 2nd, 1905.)

"Received the within copy of bill of indictment at Wilmington, N. C., November first, 1905. Executed the same by delivering a copy of same to George L. Peschau, attorney for defendants at Wilmington, N. C., November first, 1905."

H. C. DOCKERY, *U. S. M.*
By J. C. DOCKERY, *O. D. M.*

*Marshal's return to list of regular venire jurors, composing petit juries Nos. "one" and "two," and extra jurors.*

(Filed November 2nd, 1905.)

"Received the within copy of the petit jury at Wilmington, November first, 1905, and executed by delivering copy of same to George L. Peschau, attorney for Robert Sawyer and Arthur Adams, at Wilmington, N. C., November first, 1905."

H. C. DOCKERY, *U. S. M.*
By J. C. DOCKERY, *O. D. M.*

11 *Marshal's return to special venire.*

(Filed November 2nd, 1905.)

"Received the within copy of the special venire, at Wilmington, N. C., November first, 1905, and executed the same by delivering a copy to George L. Peschau, attorney for Robert Sawyer and Arthur Adams, at Wilmington, N. C., November first, 1905."

H. C. DOCKERY, *U. S. M.*
By J. C. DOCKERY, *O. D. M.*

And afterwards at the said session of said court, to wit, on Saturday, the fourth day of November, A. D. 1905, the following additional proceedings are had in said cause, to wit—

George C. Sherer, stenographer, was appointed by the court, and sworn as court stenographer.

*Marshal's return to special venire.*

(Filed November 4th, 1905.

"Received and served Nov. 1st, 1905, by summoning each of the jurors named herein to attend Nov. 4th, as directed herein."

H. C. DOCKERY, *U. S. M.*
By J. C. DOCKERY, *O. D. M.*

| | |
|---|---|
| UNITED STATES BY INDICTMENT<br>*vs.*<br>ROBERT SAWYER AND ARTHUR ADAMS,<br>Seamen. | No. 126, Criminal docket. Murder on the high seas. A true bill, November 1st, 1905. |

"Called for trial."

The defendants, Robert Sawyer and Arthur Adams, being present and in court, and represented by their attorney, George L. Peschau, esq.

The defendants, Robert Sawyer and Arthur Adams, were ordered to stand up and hold up their right hand, then put them down, when the bill of indictment was read to them by the United States attorney, charging them with the murder of E. R. Rumill, captain; John T. Hall,
12 mate; John Falbe, cook; C. L. Smith, engineer; and John S. Coakley, a seaman; on the high seas.

In answer to which the defendants both plead not guilty.

They were then asked by the United States attorney, "How will you be tried?"

They answered: "By God and My Country!"

To which the United States attorney replied, "God bring you a true deliverance."

Whereupon it was ordered by the court that a jury come to try the issues joined between the United States and Robert Sawyer and Arthur Adams, when the following named jurors were selected, to wit: G. F. Allen, J. D. McKeithan, D. J. Burney, H. G. Hewett, Monroe Hickman, F. M. Moore, W. W. Larkins, W. A. Wilkes, Billy Watkins, M. M.

Caddell, R. I. Durham, H. W. Hood, having been chosen, were sworn and empannelled to try the issues joined.

George L. Peschau, attorney for the defendants, after selecting, swearing, and empannelling the jury, objected to the array.

Objection overruled by the court.

Exception allowed.

The following United States witnesses were then sworn and examined: Isaac F. Hewett, Capt. J. W. Taylor, Henry Scott, and Theodore Simons.

Captain I. F. HEWETT, sworn, testified as follows:

Q. Where do you reside?

A. At present in Vineland, N. J.

Q. What is your full name?

A. Isaac Franklin Hewett.

Q. What is your occupation?

A. Seafaring life.

Q. State what relation you bear to the Schooner "H. A. Berwind?"

A. Well, I am the managing owner of the vessel, own—$\frac{1}{8}$, or—

Q. Captain, what do you mean by managing owner?

A. He is the man who is called on to go to the custom-house to see that the ship papers is properly made out.

Q. Well, do you know of your own knowledge where the "Berwind" was built?

A. In Millbridge, Me.

13 Q. You state that of your own knowledge?

A. Yes, sir.

Q. Did you see her in course of construction?

A. Yes, sir.

Q. Without particularizing, state, Captain, if her owners are all Americans.

A. All of them.

Q. State if she is registered as an American vessel.

A. Yes, sir.

Q. On this particular voyage state what you know in reference to the day she sailed, where from and too, the names of her officers and the names of her men.

A. We had nine hundred and seventy-five tons of coal at Philadelphia, and sailed for Cardenas, Cuba, on the 6th day of July.

Q. What day? Sixth day—this year, 1905?

A. Yes, sir.

Q. What was her destination?

A. Cardenas, thence to Mobile, thence to Philadelphia.

Q. State who were her officers when she sailed from Philadelphia.

A. E. B. Rummel, master; John Hall, mate; —— Smith, engineer (I don't know his initials), and Folby, cook.

Q. Were they all white people?

A. Yes, sir.

Q. How many seamen?

A. Four.

Q. What were their names?

A. I do not know. You see we ship men, sailors, and the managing owner never see them.

Q. I neglected to ask you what, if you know, is the registered number of the "Berwind."

A. Her registered tonnage is 910.84—gross registered tonnage I do not know—somewhere near a thousand tons.

14 Cross-examination:

Q. You say that was the information you had when she left Philadelphia?

A. Yes, sir.

Captain TAYLOR, being sworn, testified as follows:

Q. Captain, what is your full name?

A. John William Taylor.

Q. Where do you live?

A. Providence, R. I.

Q. What is your occupation or calling?

A. Seafaring man.

Q. What experience have you had at sea?

A. Had about thirty years of it.

Q. At present what position do you hold, and what boat or schooner are you connected with?

A. Master of the schooner "Blanche H. King."

Q. State, captain, if any time in October and what time you came in contact with the schooner "Berwind." Where was she?

A. I was coming up the coast; and on October 10th about 9 o'clock in the evening the lookout reported a vessel, and as we got near her I saw the vessel was having funny actions—she was not on her course. She was right in my track. At half past nine I saw a red light showing from her quarter.

Q. What do you mean by that, captain?

A. Well, she was carrying a red light in the upper rigging, but it is not allowed to carry any red lights about the vessel at night, and that attracted my attention.

Q. What cargo had you, from where did you sail, and for what port?

A. From Brunswick, Ga., to Philadelphia, Pa., loaded with railroad ties.

Q. Well, captain, go on.

A. Well, at half past nine I called the mate and told him there was something wrong. (Mr. Peschau, don't tell that——)

Q. What did you do?

15 A. When we came near to the vessel I hollowed to them and asked them what the trouble was. One man answered saying that one man had killed the captain, mate, engineer, steward, and one sailor.

I asked him what he wanted. He said he wanted to be taken off. I asked what vessel it was, and he said the "Harry Berwind."

The mate was on deck and we cleared away the big boat and went to get the men. They took them back to the "King."

Q. Who did they bring from the "Berwind" to the "King?"

A. Arthur Adams, Sawyer, and Scott.

Q. What did you do with them when you got them aboard?

A. Put them in handcuffs, tied them, and put them in the lazarette.

Q. After that did you go aboard the "Berwind?"
A. No, sir; sent the engineer, mate, and two seamen.
Q. Captain, about what was your position?
A. About south, one-half west; about thirty-two miles from Cape Fear Bar; and I told them to follow the "King."
Q. What was the first time you went to the "Berwind?"
A. Not till after she towed into Southport on the 12th. Dr. Warren went aboard before I did, then I went alongside the dock at Southport; about an hour afterwards Dr. Warren sent for me, but I did not go until he had sent for me twice. I picked them up Tuesday night and got into the bar on the 11th.
Q. During that time the mate was on the "Berwind" and the engineer was on the "Berwind" and some other officers were aboard the "Berwind?"
A. Yes, sir.
Q. And you went aboard of her when she anchored?
A. I was towed in on Wednesday, and they were towed in on Thursday.
Q. You had them aboard your vessel all this time till they got ashore—Scott, Adams, and Sawyer?
A. Yes, sir.
Q. What time did you deliver them on shore and to whom?
A. I think I delivered them some where about two o'clock to Mr. Pernell, Mr. Colier, and surrendered them to the Federal authorities at Southport on the 12th.

16 Q. The first time you went aboard the "Berwind," will you just tell the court and jury the condition you found things in aboard the vessel? You have since acquainted yourself with the "Berwind's" length and breadth, etc.?
A. Yes, sir.
Q. Will you state what—has she a forecastle and galley?
A. Yes, sir. She has a forecastle, engine room, galley, and cabin, and lots of staterooms in the cabin.
Q. Can you give now a description of conditions as they were found; did you go into the engine room?
A. I did not that day; I went into the engine room about the 13th.
Q. What did you find there—any blood?
A. No, sir; I did not see a speck of blood, nothing but the proper things belonging there.
Q. Did you find——
(Defendant's attorney objected to leading method of examining witness. District attorney did not consider questions leading.)
Q. Just describe the condition of the engine room.
A. The engine room had no sign of blood.
Q. State, captain, what are the implements usually found in an engine room, and whether or not they were intact.
A. No, sir; I found nothing but what belonged there.
Q. What belonged there?
A. Such as wrenches, hammers, and a general fit out for machinery.
Q. Did you go into the galley? What did you see there?
A. Just the usual things—stove, etc.—but no signs of blood.
Q. Did you go into the cabin?

A. I did, sir.

Q. What was the general appearance in the cabin?

A. Everything seemed to be kind of torn up—a lot of papers torn up, beds and mattress in steward's room torn up; captain's bed had blankets on; mate's room torn up, and also the steward's room. Captain's room had blankets on bed, but had no spreads.

Q. Where were the papers you mentioned?

A. On the floor.

Q. Do you know what an official log is?

A. Yes, sir.

17 Q. Where did you find that log [showing him a bound book]?

A. On the port side of the cabin on the floor.

Q. Do you recall these books [showing him two other books]?

A. Yes, sir.

Q. Where did you find them?

A. I found them afterwards—the memorandum book on the floor, on the port side (vessel's account book and captain's private book).

Q. You say you went in the office where the desk was?

A. Yes, sir.

Q. What was the condition?

A. Everything upset—papers upset. The doctor and I had a time trying to find things he had to have.

Q. Can you identify that pistol and state how it came into your possession, and when [showing him a white handle pistol]?

A. This one did not come into my possession at all.

Q. Did that "billy" come into your possession?

A. Yes, sir; took it out of Scott's bunk. It came into my possession about ten o'clock at night, October 10th. The mate gave it to me.

Q. Do you know whose pistol this was [showing him a black handle pistol]?

A. No, sir.

Q. Was it full or empty?

A. It had two blank cartridges in it.

Q. What do you mean by blank cartridges?

A. They had been fired.

Q. Did you find any bay rum or any brandy aboard?

A. No, sir.

Q. State what you found in the captain's cabin?

A. No bay rum nor any brandy nor nothing of any kind of spirits that I saw.

Q. Did you know John F. Hall, the mate on the "Berwind," that was killed?

A. Yes, sir.

Q. State if he ever served under you, and when?

18 A. Yes, sir; he did. He shipped with me in May and left me the latter part of June. We made one trip from New York to Brunswick, Ga., and back to Philadelphia.

Q. When did he leave you?

A. Something about the 26th or 27th of June.

Q. This year?

A. Yes, sir.

Q. State how much money you paid him.

A. Somewhere about $60 or $70. I cant just say.

Q. Do you know the handwriting of John Hall? [Book shown to witness to identify John Hall's signature].

A. Yes, sir. [Signature identified].

Q. State if at the time you came to the rescue of the "Berwind," was Captain Rummel, the mate, Hall, the engineer, Smith, and the cook, Folby, aboard?

(The defendant's attorney objected, stating that so far it has not been shown that any of these men were aboard, and it assumes a state of facts that as yet have not yet been proven.

DISTRICT ATTORNEY. I want to prove that they were not on that boat.

Court overruled exception.

A. No, sir, they were not there.

Q. Coming from Mobile to Philadelphia and up to the point when rescueing the "Berwind," were you sailing the same course?

A. I was, the day I came across the "Berwind"—the same course and the same direction.

Q. How far behind them were you?

A. I cannot say. I was carrying everything on my vessel—they were not—I might have been twenty miles behind them and caught up with them that night, as I was carrying everything.

Q. On that course that day did you come in contact with any boat that had on it Captain Rummel, Mate Hall, Engineer Smith, and Cook Folby?

A. No, sir; I did not.

Q. Did I understand you to describe the manner you got these men aboard your boat?

A. I sent my yawl to the schooner with mate and three men in her.

Q. I ask you to describe when you came up with the "Berwind"
19 what condition—tell how many yawl boats did the "Berwind" have?

A. Two.

Q. Where are they carried?

A. One on the davits and one on the cabin.

Q. Have they no other distinction by reason of their special uses?

A. No, sir.

Q. What is the larger one used for?

A. She is our lifeboat, we keep her on the davits for sea use in case of abandonment. Keep the small one for use all the time.

Q. From your experience in such matters, and as a sailor, I will ask you if it is possible for one man to lower this larger boat.

A. No, sir; not very well.

Q. What the condition of that boat at the time you went aboard the "Berwind?"

A. The bow was down about three or four feet and the stern fall had not been slacked.

Q. Did you find anything in her?

A. A water keg and oars.

Q. When the ship is under sail state whether or not it is usual or customary to keep a water keg in the boat?

A. Yes, sir—carry one there all the time, and a bread breaker, too.

Q. Do you keep it there?

A. Yes, sir.

Q. I have asked you about the condition of the different rooms, now tell the condition of the deck—was the deck loaded with lumber or not?

A. Yes, sir; a full deck load from the break of the poop to the engine-room—a deck load the same as all of us carry.

Q. State anything else you discovered.

A. On the cabin there was one negro dead, and the blood was streaming down off the side of the cabin and one small place of blood on the port side of the mainmast amidships on the lumber; also blood on the canvas on the cabin.

20 Q. Look at this diagram and state where that blood would be.

(Witness examines diagram and indicates position of blood stains.)

Cross-examination:

Q. You say you first sighted the vessel, or were first close to her, about nine thirty at night?

A. About nine o'clock, sir.

Q. You state that your attention was attracted first by the red light?

A. Yes, sir.

Q. How long was it before you hailed her?

A. About fifteen or twenty minutes.

Q. Did you hail*ed* the vessel yourself?

A. I did, sir.

Q. You say that they told you that they had a man tied on board who had killed the captain, mate, steward, engineer, and one seaman?

A. Yes, sir.

Q. You did not go aboard the vessel yourself?

A. No, sir.

Q. Did they make any statement about having the man tied?

A. No, sir.

Q. You did not see the man from where you were?

A. No, sir; not till the men were aboard and handcuffed.

Q. You say that you did not go aboard the vessel yourself after it had reached Southport?

A. I did not, but I put aboard of her a number of my crew.

Q. You say that when you went aboard it was after others had been aboard?

A. There was nobody there but the crew, Dr. Warren, and the pilot.

Q. Do you know that Dr. Warren and the pilot were the only men who went aboard except your crew?

A. Dr. Warren allowed nobody aboard of her.

Q. How far was your vessel moored from the "Berwind?"

A. I should think very near a quarter of a mile. I was aboard of the "Blanche King," and I know of no one that went aboard.

21 HENRY SCOTT being sworn testifies as follows:

Dist. Atty. Henry Scott it is proper to advise you that you will probably be indicted for complicity for assisting in this murder and mutiny, therefore, you will not be compelled to answer any questions incriminating to you. Are you willing to testify in this case?

A. Yes, sir.

Q. Go on and state what you know.

A. On the 6th of July, this very same year we went aboard the "Berwind" in Philadelphia, bound for Cardenas, Cuba.

Q. Who was we?

A. The captain, E. B. Rummel; Mate, John Hall; Smith, engineer; Folby, Cook, and I, Henry Scott, Robert Sawyer and Arthur Adams and John Coakley, that was the whole full crew, eight men, four white and four colored.

Q. State what position—the position the whites held?

A. Officers.

Q. What officers?

A. Captain Rummel, Mate John Hall, officers in the cabin; engineer and cook in the forecastle, and four colored seamen in the forecastle.

Q. State what location—who was on the starboard watch?

A. Sawyer and Adams.

Q. Port watch?

A. I, Henry Scott, and John Coakley. We were bound for Cardenas, Cuba, with soft coal. About the 7th of 8th of July we had trouble about the food. It was not suitable to us, so Coakley went down to the captain one day about the rations, the captain told him the rations were all right. He went forward and no more was said till Sunday, when Adams had trouble with Smith about water. The steward told him he had had five or six buckets of water that Sunday, so he told the steward he is a liar, and he called the steward a white son of a bitch, and they were about to fight, and Mate Hall was standing on the port side between the spanker rigging and the mizzen rigging and the captain parted
22 them before they started to fight, and Sawyer went forward, and he came back again and said to Captain Rummel, if I can get no water to wash here you must give my whack, and if I don't get me my whack I will make them tell everything.

Q. What do you mean by whack? [Here Scott explained to the jury that there is a legalized allowance on board ship, that a man could eat it, cook it, or throw it to the hogs, as he expressed it]. No more was said before we got to Cardenas, Cuba, then the trouble started all over again between the officers and men. We got to Cardenas Sunday, can not say what time of day. On Tuesday we started to unload coal. We were only getting two buckets—four quarts of water every twenty four hours. Sometimes when we had potatoes the steward just boiled the potatoes and handed them out, there was quarrelling all the time.

Q. Were Sawyer and Adams quarrelling?

A. Yes, sir. With the cook and also with the mate and captain. That was in Cuba.

Q. How many days did you stay in Cuba?

A. Ten days.

Q. Where did you go when you left Cuba?

A. After we left Cardenas captain was bound to Mobile, and it was worse then, quarrelling and growling all the time.

Q. State whether Sawyer and Adams were quarrelling?

A. They were quarrelling with the mate, captain, and the cook all the time. I too, was quarrelling sometimes, but not much. We got to the

break on Saturday afternoon, and on Sunday afternoon about six o'clock we towed up to the break—to Fort Morgan—and dropped from the break about four or five o'clock that night. On Monday we towed up to Mobile; we laid out in the stream Monday night, and Tuesday about two o'clock went alongside the dock.

Q. State when you left Cuba who was aboard?

A. Was the same crew that we had when we left Philadelphia.

Q. When you reached Mobile?

A. The same crew.

Q. Well, go on.

23 A. Saturday I got some money from the captain, and Coakley, and Adams got some money. I can't say whether Sawyer got any money or not. He said he had some money. That was Saturday night—the three of them were ashore—J. S. Coakley, Robert Sawyer and Arthur Adams went ashore, and I went ashore before them. On a corner between Commerce and Water streets on Government street (anybody who has been to Mobile knows where that is) I met the three, and the four of us went to get a drink. Sawyer and Adams and Coakley told me that each one of them was going to buy a revolver, so I did not say anything at all. They left me there and went to a Jew shop to buy their guns. I have an uncle in Mobile and I went up to see him and did not come back down aboard the vessel till Monday. On Monday morning I came aboard to work about a quarter to six. Before we turned to, about half past six or seven o'clock, this, Robert Sawyer, showed me a thirty eight Iver Johnson, and John Coakley did likewise. Adams showed me another—mark the name well—Harrington and Richards. Sawyer stated that we had been treated very brutal aboard this vessel; I said yes. He said, going home, if the officers do any provocation to us we are going to shoot.

Q. At the time he said that, was Adams near him?

A. Yes, sir; we all four were in the forecastle. There was no more said about anything else till the 23rd of September when we left Mobile, and left with that same identical crew.

Q. Explain, name them.

A. E. B. Rummel, master; mate, John Hall; engineer, —— Smith, and —— Folby, Cook, Adams, Sawyer, Coakley and I, Henry Scott. We were going from Mobile to Philadelphia.

Q. Between Mobile and the time you were overtaken by the "King," did anybody get taken off?

A. No, sir. We left Mobile on the 23rd of September, and from that time till we got to Tortugas quarrelling was going on the same as from Philadelphia to Cuba. We went through the straits of Florida on the 6th of October and got into a storm; we carried the fore topmast

24 away and had to stay on deck all day clearing up the wreck, and that same Friday night, the 6th of October, we got into a storm about nine or ten o'clock at night, and all hands were called on deck to reef. We put up a trisail on the spanker—that was Saturday, and Sunday we sprung our rudder head. Then we put up a jury. [Here witness attempted a witticism at the expense of the jury empaneled.] Adams, Coakley, and I put this up.

Q. Explain what you did?

A. There are two chains that run down the rudder on each side, and we took timbers and rigged up this jury so we could steer the vessel. There was a lot of quarrelling then. I, Henry Scott, was sewing the mainsail. That afternoon, when I came to supper, there was nothing to eat at all—Sunday, the 8th of October.

Q. On Monday, the 9th of October, where was the ship at that time?

A. We was about Charleston, about sixty or seventy miles at sea, between Charleston and Cape Romance.

Q. How do you know where you were?

A. The mate, who is a good friend of mine, told me. That was Monday. On Monday night I never seen the captain till eight o'clock at night, and I have not seen the captain till now. On Tuesday morning, October the 10th, these men, Adams and Sawyer, was on the lookout, and Sawyer was at the wheel; I and John Coakley was in the port watch—the mate's watch; Adams and Sawyer was in the captain's watch.

Q. What are these watches? The hours you were on duty?

A. The port watch means the mate's watch, and the starboard represents the captain's watch. I belong to the mate's watch. There watch was from twelve to four. Sawyer and Adams belong to the starboard watch, which was on deck from 12 till four o'clock in the morning. My watch was from four till eight. Sawyer made eight bells and called the watch, and Coakley and I got up and dressed and came on deck. This was on Tuesday morning. I went on the lookout forward to relieve Sawyer from the lookout and John Coakley relieved Adams at the wheel.

It was Coakley's wheel, and it was my lookout from four to six.

25 When I went to the lookout, I sat down on a post—what they call a bit. About a little while after the engineer, Smith, came up and placed the smoke stack on the forward house so it would draw, and after that he spoke to me for about five or six minutes. At a quarter past four—I could peep through and see the clock in the engine room—when I peeped through I saw that it was seventeen minutes past four, and the engineer went down below. About half past four or five—when the cook calls for coffee—he blew the whistle, and I went to get the coffee pot. When I gone to the galley there was Mr. Hall, the mate, drinking his coffee, and the steward was in the galley and Mr. Hall asked "Who called me this morning" and the cook said, "I did." When I went in the forecastle, I saw Adams lying down on the bench—had his left foot on the bench and his right foot on the floor, and Mr. Sawyer was sitting on the same bench reading a World Almanac. So I take the coffee pot and drank some coffee that was not very warm. I then went to the wheel and relieved this man, Coakley, at the wheel. When I went to relieve Coakley at the wheel, he said why do you come so soon. And I told him that the coffee was cold. Coakley said he was going forward and give the cook hell. He went forward to the forecastle and about three to five minutes I saw Coakley coming back, and I saw the cook and he was growling, and he grabbed hold of the steward and the mate went to the rescue of the cook. Then I saw Coakley let go the cook and grabbed Mr. Hall, the mate, and shoot him three times. When I saw the three reports I run to the starboard side—and Coakley had Mr. Hall throwing him overboard, and Sawyer fired two bullets into the steward and throw him overboard between the mizzen and main rigging; and I saw Mr. Adams and the engineer, Mr. Smith, were

tussling forward of the mainmast, on the port side. Coakley shot three bullets into the mate and threw him overboard on the starboard side; then Sawyer fired two bullets into the steward and Sawyer threw the steward overboard. Then Adams and the engineer, Smith, were tussling
26 forepart of the mainmast and the after part of the foresheet. Then Sawyer and Coakley then went to Adams's rescue, and when they got there each one of them, Coakley, Sawyer, and Adams, fired a bullet into the engineer, Smith, and threw him overboard on the starboard side between the fore and main rigging, and then the three went forward, and I went back to the wheel. In going back to the wheel, on the same starboard side, I found that little gun and this pouch, [indicating a white handle revolver and hostler] was lying by the cabin on the starboard side, and I take it out and put it in my pants pocket; and there were five cartridges never had been used. I hang the pouch in front of my belly. About a little while after that, ten minutes, I guess, the three of them came back aft again, but Adams staid amidships the vessel, and Coakley and Sawyer came to the wheel to me, and Sawyer said to me, "How far up do you think we are up?" I said, "We are about Lookout and Frying Pan." So then I said to Sawyer, "If we go to the westward we will make land this morning." So him, Sawyer and Coakley pulled off the spanker boom tackle and then went forward and I never saw them after that for about half an hour. Then the whole three of them came back aft again, then went and clewed up the main topsail and spanker topsail, and two of them, one apiece, went up and made them fast.

Q. What time of day are you talking about?

A. Between seven and eight o'clock on October 10th. The three of them went forward and I never saw them again till eight o'clock when I made eight bells. Then Sawyer came back to the wheel. I was at the wheel from the time I got coffee till eight o'clock; when Sawyer relieved me at the wheel, I say I am going to put out the lights. I then went down into the cabin.

Q. How long did you stay down in the cabin?

A. About a half a minute—I went down to see if the captain was in the cabin—and listened for any moaning or groaning. I did not hear any and I did not see any blood down in the cabin.

Q. Describe the condition down in the cabin.

27 A. Everything was upset down in the cabin—I went into every room in the cabin myself, and every door was unlocked, and I peeped in and not seeing the captain, I came to the conclusion that the captain was done away with by these two men in their watch on deck. In coming up on deck from the cabin the last place I was, was the pantry; there was a can of corn and a can of peaches on the dresser in the pantry. I took them up and went down to the galley, and as I know the steward was dead and overboard, I went down to get breakfast ready, and all four of us ate. So I came up again.

Q. Did you cook breakfast?

A. Yes, sir.

Q. What time did you eat breakfast?

A. About half-past eight.

Q. State whether Sawyer or Adams said who they killed?

A. They did not say anything, for I saw it all. So I went down in

the galley again and there is a pot there that was half full of water, and I put it on the stove and I got some meat and put in it, and there was a can of clams down there, and I opened it and put it in the pot, so we could get dinner ready to eat.

Q. What time was that?

A. About nine.

Q. What time do you usually eat breakfast?

A. About half-past seven.

Q. What time do you get dinner?

A. Twelve o'clock sharp. Adams peeled some potatoes, and we put them in the pot too—I cut them up and threw them in the pot, and I went forward with Coakley and Adams to the engineroom. Coakley was trying to put water in the boiler—so everything went that way till twelve o'clock. We all ate dinner. There was no more said or done until four o'clock that evening—Sawyer went down in the galley; I was down six or seven times that day, and he got supper ready by making some hash and bread, and some tea, and we all ate—that was
28 supper about five or six. The vessel sailing in its course during that time.

Q. Who was captain?

A. Sawyer and Coakley ran the ship the whole day.

Q. Now, Scott, before dinner you had gotten up to supper on the 10th of October, now take up the strand there and proceed to tell what happened at and after supper.

A. Before supper that man Sawyer went down to get supper ready; he got supper ready by making some hash, bread, and some tea. We ate between five and six, and we had some peaches which I got in the cabin, and we ate that. Between five and six, after we got through supper, Sawyer came to me and asked for the loan of my pen knife [here an ordinary pocket knife of large size was shown the witness, who identified it], and I loaned it to him, and he told me to go down in the cabin and light up; the after cabin. I went down there at eight and twelve myself, and he ordered me, between five and six, to light the light, and when I came up there was Sawyer and Adams cutting the boat cover awning of the biggest boat and threw it overboard. Coakley was at the wheel. When I went aft, the three sat down on the cabin, so Sawyer said to me, that we will take one of them little water casks and put it in the big boat and let the boat go and bring the vessel into the land and anchor her, and after we anchor, we will fill her up full of water by knocking out one of the ports, so she would be waterlogged. So then I never said anything, but asked Sawyer what was he going to let go the big boat for? He said we will let go the big boat, and we will say that the crew, four white and four colored, got capsized and swamped, and that the four colored men swam back to the boat, and we will take the vessel back into some port, and we will get a prize for so doing. I said no; furthermore, I said to them, you fellows killed all those people that morning and threw them overboard, and Coakley and Adams say no, and I said suppose a storm come up at night, what will you do?
29 Coakley and Adams said, we will take the small boat; but I said no; and Mr. Sawyer got a handy "billy" and knocked me down on deck, and the three of them jumped on me, and in about five minutes

time they had me chained and roped; the scars are on my arm now. [Witness showed scars on arm to the jury.]

Q. What time was that?

A. About six o'clock—after we had eaten supper; I could see the clock in the companion way. They took me and tied me and put me on top of the after-cabin. They tied my legs together with rope and put chains around both hands and legs, and two of them went forward—Adams and Sawyer—and Coakley was at the wheel, and I was tied down. Coakley, after he was at the wheel for half an hour, I got the chain off my hands and I tried to get the chain off my legs, and I know that if Coakley had seen me he would have shot me, so I said to him, it was about seven or eight o'clock, I said to him to go forward and get me a drink of water and a chew of tobacco. He left the wheel and I tried to liberate myself but could not do it, because there was so much chain and rope on my legs. So he came back inside of about five seconds, when he came back he saw me trying to get free and he struck me side the neck, and he drew a pistol, the big black one, and he fired a shot at me and missed me, and I took this little pistol out and shot and killed him.

Q. You could not stand up at that time?

A. No, sir; my legs were chained up but my hands were free.

Q. Did Coakley die?

A. Yes, sir.

Q. How many shots did you fire at him?

A. One shot.

Q. What size man was Coakley?

A. Was not quite as tall as I, but him and the engineer was the biggest men we had aboard, about 180 lbs.

Q. What size man was the captain?

A. Was about the size of him [pointing to the end juror nearest the witness stand].

Q. Was the captain a very active man?

A. Very active; very intelligent.

Q. What size man was the mate?

A. The mate and cook were the smallest men on board. [You, mister, please stand up, pointing to Mr. ——Bellamy] about the size of that gentleman; Coakley was the tallest.

Q. Were they both active men?

A. Yes, sir.

Q. The engineer; what size man was he?

A. He was a large man.

Q. Was he an active man?

A. Yes, sir.

Q. Strong, active man?

A. Yes, sir; very strong and very active.

Q. After the shooting of Coakley, between seven and eight, what happened?

A. There was no more done at all; the two came off and ties my hands and beat me unmerciful, and then they went forward to signal the first passing vessel, and make believe I was the man that killed the white people.

Q. They went forward and hoisted the distress signal?

A. Yes, sir; a light.
Q. What kind of light was that?
A. Red.
Q. How long before there was any answer to the signal?
A. We were picked up about ten or eleven, that same night by the captain of the "King."
Q. Now, do you remember anything about the "King" hailing you?
A. Yes, sir; this Sawyer sung out. The mate of the "King" came aboard and took the whole of us—all three—aboard on the "King."
Q. When they got you aboard, what did they do with Sawyer and Adams?
A. Put all of us in irons, down in the lazarette.
Q. How long had you known Captain Rummel?
A. Never knew him before; saw him on Walnut street, in Philadelphia.
Q. Where were you born?
A. Baltimore.

31 Q. Do you know, from what you have known of your own knowledge, or from what you have heard Sawyer and Adams say, if they had known each other before this voyage?

A. Sawyer and Coakley knew each other for several years.
Q. Do you know whether Adams knew them or not?
A. No, sir.
Q. When you went on board of the "King," who was in possession of this light-handle pistol; when did it pass out of your possession; who did you give it to?
A. Adams had it and gave it to the mate.
Q. Who had the black-handle pistol?
A. Sawyer.
Q. What did he do with it?
A. I don't know.
Q. You said something about buying two other pistols in Mobile; what was done with them?
A. Thrown overboard.
Q. How do you know?
A. I saw them thrown overboard?
Q. Who did it?
A. Sawyer.
Q. How many distinct shots were fired in that tragedy?
A. Coakley shot the mate three times; Sawyer shot the steward two times, and each fired one shot apiece into the engineer.
Q. You stated that they growling all down the coast?
A. Yes, sir; the whole trip.
Q. What were they growling about?
A. About the food.
Q. An account of the food?
A. Yes, sir.

Cross-examination.

Q. What is your full name?
A. Henry Scott.

Q. You are the man who testified in the preliminary examination in Southport?

A. Yes, sir.

Q. Scott, I want to get down now to the question of this kill-
32 ing. Who did you say Sawyer shot?

A. He shot the cook.

Q. How many times did he shoot at him?

A. Twice.

Q. How many times did Adams shoot?

A. Once; at the engineer.

Q. How many times did Coakley shoot, and at whom?

A. Three times; at the mate.

Q. How many times did you shoot?

A. One time; when I shot Coakley.

Q. Have you ever made any statements prior to this case?

A. This is a wide statement to the world. The statement at Southport was only a small statement; this is a wide statement to the world.

Q. I want to put you on your guard, and am asking you for the purpose of contradicting you. After being cautioned and taking the stand, did you not state that Adams had nothing to do with the shooting—in the preliminary examination at Southport; and that the only thing he had to do was to agree in the affair?

A. No, sir; I never said so.

Q. Are you a believer in God?

A. Yes, sir; I do.

Q. Did you not tell Captain Stelson that you did not believe in God or any hereafter?

A. I don't believe as some people do—talk good, go off and take your money and your wife, and so on——

Q. Did you not—and I am asking you for the purpose of contradicting you—say that you did not believe in any God and were willing to face what you had done?

A. No, sir; I deny that.

Q. You say Sawyer was in command of the ship?

A. Yes, sir; all three of them.

Q. Did you not—and I am asking you for the purpose of contradicting you—did you not say at Southport that no one was in command?

A. That was what Sawyer said.

33 Q. Did you make that statement?

A. No, sir.

Q. Do you say Sawyer made that statement?

A. No, sir. I said all of us were in command—no, sir; I don't believe I said that.

Q. I will ask you now, and put you on your guard, for I am asking you for the purpose of contradicting you, if you did not state in your examination at Southport, that you did not enter the mate's room nor the engineer's room, only the captain's cabin?

A. I have not been into the mate's room. You asked me if I had been in the mate's room, and I said no.

Q. I asked you if you had been in any of the cabins, with the exception of the captain's?

A. I saw no blood—I—I don't know what you are talking about.
Q. Did you not go into the mate's stateroom?
A. No, sir.
Q. Did you go into the engineer's room?
A. No, sir.
Q. You stated in your direct examination here that you had nothing to do with the killing; that you were on good terms with those who were killed?
A. No, sir.
Q. That you were on good terms with the engineer and mate?
A. Yes, sir.
Q. Where were you when all this promiscuous killing was going on, and what were you doing while your friends were being killed?
A. I was at the wheel. I relieved Coakley at the wheel for coffee, and Coakley went forward and came aft again with the mate, and they, he and the steward, started quarrelling about coffee, and he grabbed hold of the steward, and Mr. Hall went to the steward's rescue, and all
34 of them were fighting, and then I see Sawyer and Adams coming out, then Sawyer grabbed hold of the cook and shot him twice and threw him overboard, and Adams and the engineer were quarrelling forward on the port side, a little forward of the mainmast and forward part of the foresheet, and then Sawyer and Coakley had thrown the mate overboard between them; they ran to Adams' rescue, and each one of them fired a shot into the engineer and threw him overboard.
Q. I am asking for the purpose of contradicting you. Did you not make the statement at Southport, in the preliminary examination there, that Sawyer shot the mate?
A. No, sir; I said Coakley.
Q. You did make the statement in Southport?
A. Yes, sir.
Q. At your own request?
A. Yes, sir.
Q. And after being cautioned that you need not make it?
A. In fact, I did not make a statement at all.
Q. In that short statement at Southport you did not say that Sawyer shot the mate?
A. No, sir.
Q. You did not say that all of you had agreed upon a plan to get away from the vessel? You say now that Sawyer made it?
A. Yes, sir.
Q. Did you not state in the preliminary, at Southport, that they had a plan and that you had a plan?
A. No, sir; I did not say it at all.
Q. You say you killed nobody but Coakley?
A. No, sir; I took no part in the killing of anyone else.
Q. You did not go to the rescue of anybody?
A. No, sir. If I had, I would have been shot.
Q. Where did you get that pistol? You shot Coakley?
A. Yes, sir.

Q. Where did you get that pistol?
A. I got it on the starboard side, forward of the cabin.
Q. Was that not the captain's pistol?
A. I don't know who it belongs to.

35 Captain SIMONS being sworn testified as follows:

Q. Captain, where is your home?
A. New York.
Q. With what schooner are you now connected?
A. Schooner "Blanche H. King."
Q. What position do you hold on the "Blanche H. King."
A. Mate.
Q. State if you were on the "Blanche H. King" on the 10th day of October.
A. Yes, sir.
Q. State about what time you came to the rescue of the "Berwind."
A. We were near the "Berwind" about half past ten o'clock that night, I should judge.
Q. State if you are the mate that Captain Taylor referred to as having been sent aboard the "Berwind."
A. Yes, sir.
Q. Who did you take with you aboard the "Berwind?"
A. Three seamen of the "King."
Q. State what you did when you got there.
A. We rowed over as near as we dared on account of the high seas, and I called and asked the men if they wanted to leave the vessel, and they said yes, and I told them to get ready and jump in when we got near enough. They said we have a man tied on the house, can we take him along. I said, no, as I thought that I would take these two men aboard first and then consult with the captain about the other one. Finally I decided to take him any how, and told them to bring him along. They were already to jump into her. They had him tied hard and fast on the house, and I could hear them casting off the chains, as I could hear them rattling the chains, but I could not see. He was all cast loose, his hands were cast loose. I asked them if he was loose, and they said yes, and I said I don't know about taking him aboard, and they said he was harmless. I again told them they had better tie him before sending him down, they told me again he was harmless.
36 Scott, himself, said tie my hands, and he let them tie them. He was as anxious as anyone else to get into the boat. They all got into the boat; I put aft into the boat and the other two forward, and all took oars and we rowed back and took them aboard the "King."
Q. Now, after you had delivered these men aboard the "King," did you return to the "Berwind?"
A. Yes, sir. Took our small boat and went alongside.
Q. What time did you get back to the "Berwind?"
A. Between half past eleven and twelve.
Q. That night?
A. Yes, sir.
Q. Did you make any examination of the condition of the boat that night?
A. Very slight.

Q. Did you make an examination sufficient to satisfy you that there was no one aboard?

A. I went through all the houses on deck, but did not go through the lazarette—we went through all the houses—there were no lights in the houses, only the binnacle light.

Q. Did you go through the cabin that night?

A. Yes, sir.

Q. Just describe the condition?

A. Everything seemed to be in fair condition—there was a chart lying on the table with ruler and dividers there as if some one had been trying to study out the chart a little. The engine room was in bad shape, as if some one had been trying to get water in the boilers, and the fire was about halfway down—they had been using salt water.

Q. Were the papers scattered in the cabin?

A. All the papers that were in the captain's secretary were taken out and put in a chair.

Q. You know an official log, do you?

A. Yes, sir.

Q. Do you recognize that, did you find that [exhibiting a cloth bound book]?

A. Yes, sir; it was lying among the papers in the office.

37 Q. Did you find these two books [showing two other books]?

A. Yes, sir; they were in the secretary.

Q. Examine these books, and say if they are the ones.

A. I did not look through the books, but think these are the ones.

Q. State what else you found in the cabin. Did you go into the dairy or closet where they keep anything to eat—did you go through the pantry?

A. Yes, sir.

Q. State what you found in there.

A. Found a few stores—canned goods of different kinds.

Q. Find any liquids?

A. No, sir.

Q. Find any spirits?

A. No, sir.

Q. This pistol—state if you saw this pistol that night and who handed it to you [showing pistol].

A. It is the pistol Sawyer—no, Adams handed me in the boat.

Q. Do you remember whether it was entirely empty?

A. There were two loaded and three empty cartridges in it, and I gave it to Captain Taylor as soon as I got aboard. Sawyer said I would find a pistol on the rudder head.

Q. Did you come into possession of it that night?

A. No, sir.

Q. Don't know anything about it?

A. No, sir.

Q. Who did you hand this pistol to?

A. Captain Taylor.

Q. Do you recognize this instrument [showing a "billy"]?

A. Yes, sir.

Q. Where did you get that from?

A. Out of one of the bunks in the forecastle, where the men stay aboard the "Berwind."

Q. Do you know anything about this rope—where it came from [showing rope]?

A. It looks very similar to the one Scott was tied with when brought aboard.

38 Q. Next morning when it came daylight, state if you found any signs of blood, and where you found them, if you did?

A. Yes, sir; found a couple of places that looked very much as if there had been blood, and it looked so, too, as if it had been washed off, as it was getting dim.

Q. Where were these places?

A. One place was on the lumber on the port side, the other was where the tussle between the engineer and Adams is said to have taken place.

Q. Was the blood there? [Pointing to a chart of the schooner's deck.]

A. Yes, sir. [Indicates places on chart where blood was found.] It has the appearance of having been washed up. There was another place between the two after masts on the port side.

Q. How long before you got the "Berwind" in?

A. We came to an anchor about nine o'clock next morning.

Q. Where?

A. About one and a half or two miles outside the bar at Southport.

Q. Then you were towed in?

A. The morning after.

Q. You came to anchor about nine o'clock Wednesday morning, and were not towed into Southport till Thursday morning?

A. No, sir.

Cross-examination:

Q. Mr. Simons, you were with the boat crew that went to the "Berwind?"

A. Yes, sir.

Q. And took these men off and carried them aboard your vessel?

A. Yes, sir.

Q. You do not know who killed the crew of the "Berwind?"

A. No, sir.

Q. You and some sailors of your crew boarded them—you don't know who wiped up the blood stains you say you saw there?

A. No, sir.

Q. You don't know who fixed the cabin in the condition you saw it?

A. No, sir.

39 Q. All you know is that you brought the vessel in?

A. Yes, sir.

The court orders the United States marshal to take charge of the jury empannelled in this cause.

And afterwards at the said session of the said court, to wit: On Monday, the sixth day of November, A. D. 1905, the following additional proceedings are had in said cause, to wit:

J. K. Crump, stenographer, was appointed by the court and sworn as court stenographer.

It is ordered by the court that the jury be called, and each juror answers to his name.

Arthur Adams, one of the defendants, is called and after being warned and told that he need not say anything that would incriminate himself, he is sworn and testifies in his own behalf, as follows:

ARTHUR ADAMS placed on stand.

Counsel for defence Peschau recited to Adams the charges which had had been brought against him of murder and mutinous conduct aboard the American schooner "Harry A. Berwind," while on a voyage from Mobile to Philadelphia, and instructed Adams to tell the court and jury fully, from beginning to end, just what trouble was had aboard the schooner.

A. I joined the schooner "Harry A. Berwind" on the 6th day of July 1905, and on the way going to Cardenas the first trouble was when Henry Scott was at the wheel. Scott struck one bell to be relieved, but left the wheel before another man could reach him—left the wheel and came forward—asked the captain to hold the wheel—and captain told him to strike one bell. After Scott came back to the wheel Coakley, who had gone to relieve him, came back forward and said, "Henry Scott struck the captain." The next trouble was when Sawyer went to get some water, and had some words with the cook. Don't know what was said—I saw Sawyer put the bucket down and then take it up again and go on. I heard Sawyer say, "If the cook wont give me my water I want my whack. The captain said, "All right, John, go forward; you will get whatever is your due."

Q. What took place while in Cardenas?

A. Everything was all right in Cardenas.

Q. After leaving Cardenas?

A. On leaving Cardenas for Mobile we all had to go in the rigging to set sails. Scott had the easiest mast and got ready first, and sung out to hoist away, and the captain called to him to help hoist, and Scott said "I won't do it. What you got a steam donkey for?" The captain asked him who he was giving orders to. Later I saw Sawyer and Coakley talking to the captain; could not hear all that was said, but did hear the captain say that those three men (referring to Sawyer, Coakley, and myself) are as good men as ever put to sea.

We got to the bar at Mobile Saturday, and Sunday the tug took us in to the quarantine station. I was sick with malarial fever two days before reaching Mobile, and one day after—three days. We got up to Mobile at 12 o'clock Monday night, and the next day, Tuesday, went alongside the dock.

While in port Henry Scott went ashore to sleep every night. Sawyer also went ashore frequently. I was sick and did not go ashore until Saturday night, when I went off with Scott. Henry Scott did not come aboard until 12 o'clock the day of leaving, and the vessel was delayed two hours waiting on him. The tug was alongside. I heard the captain say, "If I could get another man I would not keep him a second."

Q. When did you leave Mobile?

A. The 23rd day of September.

Q. What trouble first took place after leaving Mobile for Philadelphia?

41 A. We were struck by a squall and the topmost sail gave away, and got broke in two places.

Q. Was there any trouble aboard at that time?

A. No.

Q. What was the first trouble you had?

A. This killing.

Q. Now come right down and let the court hear what you know of this killing, from beginning to end.

A. On the morning of October 10th, Captain Rumill, Sawyer, and myself were on the starboard watch from 12 o'clock to 4 o'clock (night). Sawyer went to the wheel at 12 o'clock, but before 2 o'clock I went to relieve him. My watch was out at 4 o'clock, but as the captain did not come out, and I did not know the time, it was 12 minutes past four when I struck eight bells and John Cokely came to relieve me, and Scott went to relieve Sawyer on look-out. When I got in the forecastle, I said the captain must be sleeping, as it was 12 minutes past four. Sawyer said no, the captain is not sleeping—he is in the engine room with the engineer, helping him with the pumps. I listened and heard the capt. and engineer talking. The vessel had sprung a leak in the squall and the pumps had to be worked night and day.

Q. This was now after 4 o'clock in the morning?

A. Yes.

Q. What then?

A. Myself and Sawyer went to bed. About 5 o'clock we had coffee, and about that time Cokeley ran to the forecastle door and sung out, "Boys are you sleeping—get up—they are shooting aft—I don't know whether it is the captain or Scott shooting."

Q. Were you asleep?

A. I was sleep but he wake us up.

Q. What did you hear after you woke up?

A. I was so frightened I sat on the side of my bunk. I heard Cokeley say he did not know who was shooting—whether it was the captain or Scott. We stood in the forecastle door about three minutes, when Scott came back forward and ordered Cokeley to go back to the wheel, and he said "You fellows stay in the forecastle, I mean to shoot
42 every damn man aboard," and we staid in the forecastle. He went aft again and we heard more shooting, and Sawyer went out, and I peeped through the door. Heard Sawyer yell out, "O Lord don't shoot me," and run back to the forecastle. A little later Henry Scott came back and said, Sawyer, you and Adams come out and screw up the main and spanker top-sails. He said, I don't want you fellows to have nothing to do with this. When the white folks ask about it, I will tell them I did it. You fellows do as I tell you. I said all right. When we went on deck, there was not a soul to be seen, except Cokeley, who was at the wheel. Scott had disappeared below.

Q. Did you have a gun?

A. No, sir; never owned a gun in my life.

Q. Well, go ahead.

A. When we finished with the sails, Scott came back and said, "Now, you fellows go forward and do as I tell you, and when we get into port I will tell the white men I did it." Scott had a gun hanging in his belt

outside. After going forward I heard talking, and looked out and saw Scott walking up and down. I also saw the engineer. I did not know where he came from. The engineer was washed in blood and Scott was on the house walking up and down with a gun, pointing it at him, and the engineer was praying to God. Scott was speaking to him about half an hour; I could not hear what Scott said. They talked half an hour, while the engineer was bathed in blood. Next thing I heard a gun go off and heard a splash in the water, and heard the engineer calling as he went astern.

Q. What time was that?

A. I should say it was about six or half past six.

Q. That was the first time you had seen the engineer that night?

A. Yes.

Q. What next?

A. After that he came forward and went out, and I saw Scott and the mate on the weather side of the galley. I said, "O, look! the mate is rocking like he is wounded."

Q. Had you heard any shots?

A. Yes; heard some shots. Afterwards saw the mate rocking
43 and begging for mercy. Scott ordered the mate to go overboard, and the mate would not go, but was fighting for his life. Then Sawyer said, "I am going out there; I believe Scott's gun is empty." Sawyer started, but Scott stopped him and said "Get back," and Sawyer came back forward. The mate begged Sawyer for God's sake to come and help him.

Q. Why could you not have gone to the mate's assistance?

A. I was afraid to go, because Scott was armed.

Q. Go ahead.

A. When Sawyer came back forward, Scott put two shots into the mate and threw him overboard on the weather side.

A little later 8 bells were struck, and Sawyer went to the wheel and Cokeley came forward, and Scott ordered us to put some water in the boiler. Cokeley and myself put the water in.

About this time we heard some shots under the deck, in the direction of the galley. Then Scott came forward again, and went off the second time, when we heard some more shots in the same direction. Then he came forward and went off again. Then immediately he came to the rail with the steward in his hands and threw him overboard on the weather side.

Q. How did you know it was the steward?

A. Because he was a very small man.

Q. Was that the last white man aboard?

A. I don't know what became of the captain.

Q. What then took place?

A. Scott came on at 12 o'clock and said, "Boys, I want you fellows to do as I tell you; if you don't do as I tell you I will have to kill you three fellows." Lower the big boat; fill it with water, and let it go; and then we will take the vessel in port, and when they ask us for the white men we will say, we all left the vessel in a gale, and the boat swamp, and we swim back to the vessel, and the white men in the other boat got drowned." We all agreed to this, because he said he would

kill us. After awhile, we were talking among ourselves, and Sawyer and Cokeley say the best thing to do was to get a chance to hold Scott down and tie him. I said how can we hold him down; he has gun and we have none.

Q. Did none of you men have guns?

A. No, sir.

44 Scott ordered Robert Sawyer to make supper, and after eating I went to the wheel and they had supper; then when I was relieved, Sawyer, Scott, and Cokeley went aft towards the wheel and I went forward. Just then I heard them sing out "We have got Scott down." I went and we took away the gun. We got a chain and tied him down. He cried, "O, boys don't do that; let me go and I will jump overboard." We were afraid to do that, as he had told us he had two guns, and we thought he would get the other big gun and shoot us. We had him sitting on the stearing gear, and he asked for his quilt and overcoat. I went and got the quilt and overcoat, and searched the coat. I spread the blanket, and then Sawyer, Cokeley, and myself put him on it. He was not lying down—he was simply leaning back. He asked us to put the overcoat on him to keep off the dew. I spread the coat around him. About that time Sawyer sung out that he saw a light, and went up in the rigging to but could not make it out. We saw another light, and Sawyer went forward and I went up in the fore-rigging, and saw a steamboat, and came down. When I was nearly down I heard shooting, and heard Cokeley sing out, "O Lord, I am shot." When I got to him, Sawyer was there and had hold of Scott; Cokeley was laying across Scott. Sawyer was trying to get the gun away from Scott, and we had to beat his hand to get the gun. I got Cokeley off of Scott. Cokeley was trying to vomit, and Sawyer said go forward and get him some salt and water, but that did not make him vomit. Sawyer told me to go forward and get a red light and signal the steamboat. I went forward and then Sawyer came forward and said Cokeley was dead, and both of us signalled to the steamer, but she did not come to us.

Q. How did you signal to the steamer?

A. With a red light.

Q. What was done next.

A. Why pretty soon we saw another light on our lee coming up, and we kept on signalling, and the vessel came up to us. Sawyer called out to them, and they said, what do you want. Sawyer called back, and said, for God's sake come to our assistance; one man aboard has killed the captain, mate, engineer and cook, and killed a sailor just now.

It was a good while before they came to us. They lowered a
45 boat and came up about ten or eleven feet to us, and the mate or some of them asked us what the man's name was that did the killing.

I told him Henry Scott. He then asked us if we had him tied, and we answered yes.

Q. Did they take you all off—what did they do?

A. Sawyer got aboard first, and the minute he did they handcuffed him, and did me the same way. Henry Scott got on next, bound with a rope, and they did him the same. We were kept separate at first.

Later they bound us all together and put us down the lazarette; we were there all night and all next day.

Q. Adams, did you at any time prior to this killing enter into any agreement or compact, or know of any plan on the part of any men aboard the schooner "Berwind" to kill these people?

A. No.

Q. Had you heard of any such plan?

A. No.

Q. Did you yourself kill any man or assist in killing any?

A. No.

Q. I will ask you now why it was, when this killing was taking place, that you did not go to the assistance of any of these men?

A. Because I was not armed, and the man who was doing the killing was armed.

Q. Did you, or did any of you, to your knowledge, purchase pistols while in Mobile?

A. No, sir; not to my knowledge.

Q. Did you see any pistols aboard, except those Scott had?

A. No, sir.

Q. Scott testified that while in Mobile on Saturday, you and Sawyer and he went ashore, and that each of you went to purchase a revolver?

A. No, sir; that is not true.

Q. He states that in Mobile you showed him a pistol—a Harrington & Richards—that you had purchased; is that true?

A. No, sir.

Q. Did you have a pistol at any time?

A. No sir; never owned a pistol.

46 Q. Were there any threats made by the crew, to your kuowledge, of a mutiny, between Philadelphia and Cardenas?

A. No, sir.

Q. Were there any between Cardenas and Mobile?

A. No, sir.

Q. Was Sawyer in command of the boat after the killing had taken place?

A. No, sir. Henry Scott was in charge. Sawyer was in charge after we had Scott bound.

Cross-examination of Witness Adams by District Attorney SKINNER:

Q. Adams, what experience have you had as a seaman?

A. Only two years and a half.

Q. Where were you born?

A. St. Vincent, British Islands.

Q. Can you recall the vessels that you have sailed on?

A. Yes.

Q. What was the first?

A. I left home on the "Wm. A. Rosier," which was a whaler.

Q. How long did you stay aboard her?

A. About four months.

Q. The next one?

A. The schooner "Benefit."

Q. How long were you on her?

A. Fifteen months and some days.
Q. Who was the captain of the "Benefit?"
A. Captain Falkner.
Q. I will ask if within the latter part of the 15 months you were on the schooner "Benefit," you did not have trouble and try to create insubordination aboard the "Benefit?"
(Objected to by Mr. Peschau, counsel for defense.
Objection overruled by the court. Exception allowed.)
Q. State what trouble you had on the "Benefit?"
A. I was never logged. The only trouble was that the cook gave us molasses to make tea, and I said that was not right, and myself and three other men went to the captain and asked him if he thought
47 it was right. He said they did not have much sugar, and we would have to use molasses; and then I took the tea and threw it overboard and went forward.
Q. Did you not, from that time on, during that voyage have continuous trouble aboard the "Benefit"—and even after the captain had explained to you, you went and threw your tea overboard and then went back and tried to create mutiny?
A. No, sir; when I was told the second time there was no sugar and we had to use molasses, I said nothing more.
Q. Did you not go back among the crew and try to create dissatisfaction?
A. No, sir.
Q. Did you not go and demand your wack?
A. After we got out to sea, there were some complaints about our food.
Q. Did the captain not threaten to put you in irons?
A. No, sir.
Q. After you left the "Benefit" what other vessel did you sail on?
A. The "Benj. Russell."
Q. How long were you on her?
A. Three months and twenty days.
Q. Where did you join this vessel?
A. Delaware; she was an American vessel.
Q. Where did you join the "Berwind?"
A. Philadelphia.
Q. Can you state any circumstances that led you to join the "Berwind;" did you know any of the sailors on her?
A. No, sir.
Q. Had never known Sawyer, Cokeley or Scott?
A. No.
Q. Nor any of the officers?
A. No.
Q. How was it you happened to get aboard the "Berwind?"
A. The shipping master shipped us. He gave me papers to go to the commissioner and sign; I went alone; the other three men had already signed.
Q. When you signed, did you notice that the other three had signed?
A. I did not notice what the names were.
48 Q. Could you tell your own signature if you were to see it?
A. Yes.
Q. Where did you sign?

A. In Philadelphia.
Q. What kind of a book?
A. Can not describe it.
Q. Do you know the official log from the daily log?
A. I don't know anything about the log.
Q. Did you read the poster on the forecastle of the "Berwind?"
A. Yes, sir.
Q. And understand that same advises a seaman of his rights and also of the duties of officers?
—. ———.
Q. What time did the ship sail from Philadelphia?
A. On July 6th, 1905.
Q. What is your full name?
A. Arthur Adams.
Q. Where were you born?
A. British West India Islands—St. Vincent.
Q. How old are you?
A. 23 years old.
Q. When you signed the log, did you not notice that Scott, Sawyer, and Cokeley had already signed before you?
A. I saw the writing, but did not look over the names.
Q. Were any of them present when you signed?
A. No, sir.
Q. Were either Scott, Sawyer, or Cokeley and yourself ever shipmates before?
A. No, sir.
Q. Do you know where Cokeley was born and raised?
A. He told me he belonged to the Virgin Islands.
Q. How about Sawyer?
A. He said he was from Nassau, New Providence.
Q. And you had never seen him before?
A. No, sir.
Q. You left Philadelphia what day?
A. The 6th day of July, 1905.
Q. When you started out from Philadelphia, who was aboard?
49 A. Captain Rumill, mate, engineer, and cook.
Q. Don't you know the names of the mate, engineer and the cook.
A. No, sir.
Q. You were aboard that ship from July 6th to October 10th, and did not know their names?
A. I heard the captain call the mate "Hall." I don't know the names of the mate, engineer, or cook.
Q. Don't know the name of the man who cooked for you, or that of the engineer?
A. No, sir.
Q. What size man was the captain?
A. Guess he would weigh about 155 pounds.
Q. How tall?
A. Not as tall as myself.
Q. Was he very active?

A. Yes, sir.
Q. More active than you?
A. I guess he was fifty times more active than myself.
Q. How about the mate. What size man was he?
A. About ½ inch taller than the captain, but was not as stout.
Q. Was he an active man?
A. Yes; he seemed active.
Q. How about the engineer?
A. The engineer was a big man—bigger than any of them.
Q. Have you ever been in the engine room?
A. Yes.
Q. Did you not see all kinds of implements of defense, such as monkey wrenches, hammers, and so on?
A. Yes.
Q. The engineer's sleeping appartment was immediately next to the engine room?
A. Yes.
Q. And all of these implements right at his hand?
A. Yes.
Q. What size man was the cook?
A. The cook was a small man.
50 Q. He is the man you all wanted to pick at?
A. No, sir.
Q. Scott is a colored man?
A. Yes.
Q. Cokeley was a colored man, as well as Sawyer?
A. Yes, sir.
Q. And you call yourself a colored man, I presume?
A. Yes, sir.
Q. Did the steward prepare a common mess for the sailors?
A. Yes.
Q. How did you all like the food furnished by the steward?
A. It was not coming right.
Q. You mean to say that you had this paper stuck up on the forecastle showing the proper allowance of food that you had a right to demand, and that according to your understanding the food was not coming right?
A. Not exactly according to that—but what was coming was not suitable; we did not like it.
Q. And you had some talk about asserting your rights and calling for your whack? I mean you had some talk between yourselves—you and Scott and Sawyer and Cokeley—you were grumbling?
A. We were dissatisfied. Cokeley was dissatisfied, and Scott was dissatisfied. For two days straight the cook was giving us baked beans for breakfast, dinner, and supper—which was not according to regulations, and we did not like it.
Q. And that created dissatisfaction between the forward and aft.
A. They did not know anything about it aft.
Q. You went on until July 30th, when you had some little trouble?
A. Don't remember exactly.
Q. How many days out from Cardenas before you did have trouble?
A. Can't rightly think (remember) what was first day we had trouble?

Q. Do you remember the day that Sawyer went for some water, just before reaching Cardenas?

A. Yes.

Q. And you remember that the steward told him not to use so much?

A. I did not hear what the steward said.

Q. Did you know whether Sawyer was angry?

51 A. Yes, he seemed to be—by his looks.

Q. Did you not hear him abuse the steward, calling him a white s——b——?

A. No, sir. When he came forward he told us the cook called him a black s——b——. I was at the forecastle and both of them were at the galley.

Q. You were looking at them?

A. Yes, sir; part of the time.

Q. Were you looking at them when Sawyer attempted to strike the cook? Did you see Sawyer strike the cook?

A. No, sir.

Q. Did the captain have to come out and part them, and send Sawyer forward and the steward down in the galley?

A. I saw Sawyer put down the bucket, and the captain turned around from the rail, and said, "Go forward, John, you'll get whatever is due."

Q. After Sawyer went down in the forecastle, did you, Scott, and Cokeley not talk over the instance, and you all became very angry and mad with the officers?

A. No, sir; I am never angry.

Q. Tell me why it was that on the same day the whole crew demanded their w*h*ack?

A. We wanted it weighed out to us.

Q. The crew then went forward and demanded that the scale of provisions be weighed out to them—the next day?

A. The cooked told Sawyer if he wanted his rations weighed out, to go to the captain. Three of us went and saw the rations weighed out—but we did not demand it.

Q. Is it not a fact that each individual has the right to demand his w*h*ack?

A. He said that he could weigh us our w*h*ack, and the next afternoon I was at the wheel and three of us went out and saw it weighed out. And one day's allowance was weighed out to us every day.

Q. Then the steward would have to cook it for you?

A. Yes; we got our w*h*ack every day, and the steward cooked it for us and everything was all right.

52 Q. After you got quieted about the w*h*ack, it was only a few days later that you arrived at Cardenas?

A. Yes, sir.

Q. How long did you stay in Cardenas?

A. About 14 or 15 days.

Q. Did you get any money in Cardenas?

A. Yes—$2.00.

Q. Did Sawyer get any?

A. No, sir.

Q. Of your own knowledge—did Sawyer have any money?

A. I don't know.

Q. Do you remember anything in particular which happened while the ship was at Cardenas?

A. No, sir. I asked the captain for $2.00 to buy a parrot. Scott borrowed a dollar from me, which is not paid yet.

Q. What day did the "Berwind," according to your recollection, leave Cardenas?

A. Sunday morning.

Q. Was there anything of particular moment which happened between Cardenas and Mobile?

A. Yes; when we leave Cardenas there was not a topsail set and the captain send us up to set them. I went on the mizzenmast, Sawyer on the main, and Cokeley on the fore. Scott sung out to hist away on the spanker. Captain said, "You help hist," and Scott said "What is the steam donkey for;" and then the captain asked him who he was giving orders to, and that was finished.

Q. What do you mean by "that was finished?"

A. I mean there was no further trouble.

Q. When did you reach Mobile?

A. We reached the bar at Mobile Saturday evening, and were towed into Mobile Monday afternoon. I was sick at that time with malarial fever.

Q. What day did you go ashore?

A. The first day I went ashore was Saturday. Scott and I went ashore and went into a barber shop to get hair cut. I told Scott I was sick, and went back to the ship.

Q. Did you get any money before going ashore?

53 A. Yes; captain gave me $10.00. I asked for $5.00, but he had nothing less than a $10.00 bill, and so gave me that.

Q. Do you know how much money Cokeley got?

A. No, sir.

Q. Do you know how much Sawyer got?

A. No, sir; before we got to Mobile Sawyer asked me what I did with the $2.00 I got in Cardenas. I told him I loaned Scott one and had the other one, and he asked me to lend it to him.

Q. Go back, Adams, just a moment, to Cardenas. Do you know what stores the captain bought at Cardenas?

A. Don't recall.

Q. Did you not help to handle them?

A. All I handled was a sack of potatoes. A boat came out to us every morning and brought fresh meat.

Q. When you went ashore at Mobile you bought a pistol?

A. No, sir.

Q. You heard Scott testify that you did?

A. But we three went ashore yet.

Q. Did not Cokeley and Sawyer and yourself go ashore?

A. Yes; one time, I remember, three of us and a man from another vessel went ashore. The three & Scott went their way, and I and the other man went down town.

Q. What kind of pistol did Cokeley buy?

A. I don't know anything about that.

Q. What kind did Sawyer buy?
A. None to my knowledge.
Q. What kind did you buy?
A. I did not buy one.
Q. Don't you recollect that just before you left Mobile, you, Scott, Cokeley, and Sawyer pulled out those four pistols, and you made a statement that you were prepared then, if satisfaction did not come, to do some work?
A. No, sir.
Q. Did you then say in the forecastle that the captain and officers had been imposing on you during the voyage, and that you were prepared?
A. No, sir; I could not say that they had imposed on me.
54 Q. You say that Scott was ashore and the captain was about to leave him?
A. He said if he could get a man right then, he would not wait a second.
Q. How long did they wait for Scott?
A. About two or two and one-half hours.
Q. You went along then from Mobile. Who was aboard when you left Mobile?
A. When we left Mobile, we had eight men aboard and the pilot—9 in all.
Q. You left on Friday?
A. Think it was Saturday. Can't say positively.
Q. Did anything of particular moment happen on the deck between forward and aft, or between the officers and the men, from the time you left Mobile, up to the time of the tragedy?
A. No, sir.
Q. What day was it you had a gale?
A. We had a squall on Friday, which took off the topsail.
Q. How many days was it before you got into the gale?
A. The next day.
Q. Was it a heavy gale?
A. Yes, sir.
Q. Carried away the rudderpost?
A. Yes.
Q. In that gale the vessel sprang a leak.
A. Yes.
Q. How long was that before the tragedy?
A. Two days.
Q. Now, you have made four statements relative to the actual facts that occurred on October 10th aboard the "Berwind." One before the commissioner at Southport, two to Capt. Stetson, and one to-day—at which time were you telling the truth?
A. All together were true.
Q. Well, now, suppose you take your statement first before the commissioner. You stated that you were on the captain's watch, and you had watched from 12 to 4 o'clock—the captain, yourself, and
55 Sawyer. And that Coakley, the mate, and Scott belonged to the mate's watch. That it was your place to go off duty at 4 o'clock.
A. At 4 o'clock it was my place to go forward.

Q. What time is it customary to strike the first bell?

A. About 15 minutes to four.

Q. Why was it that on this particular occasion you delayed making that bell until 10 minutes to four?

A. Captain looked at his time and sings out one bell, and then goes back aft; but he never sung out one bell this time, and I thought he was sleeping. I thought it was 4 o'clock, and I looked, and it was 12 minutes past four, when I struck eight bells.

Q. Is it not the custom that a man on duty watches the clock closely, and strikes the bell at the very moment?

A. When you are at the wheel you can't see the clock. The watch had stopped about a day, and the captain had not fixed it up.

Q. What time did you go off duty?

A. At 22 minutes past four.

Q. Can you recall any other time that you ever remained on duty 22 minutes beyond your time?

A. It was all on account of the captain not coming up. I thought he was sleeping.

Q. Could you see the cabin?

A. Yes.

Q. Could you see anybody on that boat after 4.22 go down into the cabin, if they had gone?

A. Yes.

Q. What time did you see the captain come out of the cabin?

A. I did not see him come out.

Q. If he had come out, you could have seen him?

A. Yes.

Q. Did you see anybody go into the cabin, or did you see anybody come out of the cabin?

A. No sir; when I went forward the captain was in the engine room.

Q. There is a door at the entrance near the wheel?

A. Yes; but it was barred up, and the rear door only could be used.

56 Q. As you passed by the engine room did you see the steward in the galley?

A. No, sir.

Q. Did you not want your coffee?

A. No, sir; don't get any at that time.

Q. You went to the forecastle immediately?

A. Yes, sir.

Q. You passed by the engineer's room?

A. The engineer's room is on the port side, but there is no door on that side.

Q. Which side of the deck did you take on your way from the wheel to the forecastle?

A. Took the lee side.

Q. If you had gone on the starboard side could you not have seen in the engine room?

A. Yes.

Q. When on the port side, could you not see in the engine room?

A. Yes; could have seen through the window.

Q. What size is that window?

A. About 16 inches square.

Q. Did you not state at Southport and to Capt. Stetson that you went to the engineer's room and looked in, and that the captain was pumping, and the engineer had retired?

A. No, sir.

Q. Had the vessel sprung a leak, making it necessary for the captain to relieve the engineer?

A. I did not say he was pumping. I did not see the captain; I simply heard him.

Q. Did you see the engineer in the engine room?

A. No, sir; I heard his voice.

Q. Did you state to the commissioner at Southport and did you state to Captain Stetson that you saw the captain in the engine room and the engineer, and the captain told the engineer to go and take a rest?

A. I told Capt. Stetson that when I leave the wheel I came to the forecastle and told Sawyer I did not know captain was sleeping, and he said the captain is not sleeping—he is in the engine room. Then
57 I listened through the partition and heard the captain and the engineer speaking.

Q. Where did you find Sawyer?

A. In the forecastle. He had retired.

Q. How did he happen to go in ahead of you?

A. When the bell struck, other man relieved Sawyer and he went in the forecastle.

Q. Could you give me any idea how far it is from the forecastle down to the galley?

A. The forecastle is to the foremast, and the galley is to the mizenmast. Don't know the distance.

Q. Did you see any lights in the galley when you passed?

A. Don't remember seeing any.

Q. The galley has a window?

A. Yes.

Q. You can't say whether you saw the steward?

A. The steward sleeps in the cabin.

Q. Did you see—between 12 o'clock and 4 o'clock—the steward, the captain, the mate, or the engineer come out of the cabin?

A. No, sir; no man at all.

Q. Who was the first man you saw?

A. I found Sawyer in the forecastle. Cokeley then went to the wheel, and Scott went to relieve Sawyer.

Q. Then at 4.22 Scott would be on the lookout and Cokeley at wheel?

A. Yes, sir.

Q. Prior to that time had you heard any shots?

A. No, sir.

Q. You had not heard any up to the time you left the wheel?

A. No, sir.

Q. That would leave Scott on duty, and would leave you three (?) to sleep, and you and (?) Sawyer would have had an opportunity then to get together?

A. Yes.

Q. You did not have to go to sleep?
A. We were not compelled, but we did go to sleep.
Q. How long had you been in the forecastle before you heard anything?
58 A. It was about 5 o'clock when Cokeley came and called us.
Q. You mean to say that Cokeley left the wheel and came down to the forecastle and notified you all that Scott was shooting?
A. No, sir. He said, "Here, you fellows, get up; they are shooting aft," and when we got up I heard him say that he did not know whether it was Scott or the captain shooting.
Q. Cokeley, coming from the wheel, would necessarily have to pass where the shooting was going on, would he not?
A. Yes.
Q. And Scott, to do the shooting, would have to come from the lookout way down to where Cokeley was?
A. Yes.
Q. And then he could not tell who was shooting?
(No answer.)
Q. At any rate, that was the message?
A. Yes.
Q. What did you then do?
A. I got up and sat on my bunk.
Q. How many shots had been fired?
A. Cokeley did not say.
Q. Did you state before the commissioner, and before Captain Stetson, that the first you knew about this matter was that you, yourself, being in the forecastle, heard shooting?
A. No, sir; I did not say that to Captain Stetson.
Q. Did you say so before the commissioner?
A. No, sir; I never said so to anybody.
Q. On hearing the shooting, you got up and went out?
A. No, sir.
Q. Did you not tell Captain Stetson, and also the commissioner, that then you went on deck and saw the mate covered with blood?
A. I did not get on deck until Henry Scott told us to go and fix the sails, and after that he ordered us forward, and we did not see any of the officers. Later we saw the engineer, but did not know where he came from.
Q. Did you not say you heard shooting, and that Sawyer and you went on deck and saw the engineer washing blood off his hands and face?
A. No, sir. I said Henry Scott bid us to go on deck.
59 Q. When was it you first heard shots?
A. The first of the shooting I heard was when Sawyer went out on deck, and then I looked and saw the engineer washed in blood.
Q. I want to know the beginning of your knowledge of this shooting.
A. After Cokeley called us.
Q. Did you tell that before the commissioner?
A. Yes.
Q. And that was the first you knew of any shooting; you got the information from him?
A. Yes.

Q. Now, you then came on deck?

A. No, sir.

Q. Did you not tell Captain Stetson and the commissioner that you came on deck and saw the engineer washed in blood?

A. I did say that I saw the engineer washed in blood, but not at that time.

Q. How long, then, before you heard any shooting?

A. After Cokeley woke us up, it was only a few minutes till Scott came to the forecastle door and said, "You fellows stay in the forecastle; I mean to shoot every damn man aboard." And after going off we heard shots.

Q. In what direction?

A. Somewhere about the mainmast.

Q. How far from the galley?

A. The galley is further aft.

Q. Where were you?

A. I was in the forecastle.

Q. Then what did you do?

A. Sawyer came out, and I peeped, and Sawyer came running back.

Q. Did you not tell Captain Stetson on two occasions that after the first shots you then went in and got in bed and went to sleep again?

A. No, sir.

Q. The next time you came up you saw more shooting and you went back and turned in and went to sleep again?

A. No, sir; I did not say so.

Q. And did not say so before the commissioner?

60 A. No, sir.

Q. Now, the second shooting; what did you see on deck?

A. Henry Scott told us to come on deck and screw up the main and spanker topsails.

Q. At that time, when you came up, how many shots had you heard?

A. I don't know how many.

Q. What is your best impression of the number?

A. Can't rightly say.

Q. Who did you see when you came on deck?

A. Saw Cokeley at the wheel and saw Scott.

Q. Did you not see the captain, or mate, or cook, or engineer?

A. No, sir.

Q. What time of day was this?

A. About half past five or six o'clock.

Q. Then what did you do?

A. After fixing sails we went forward and went in the forecastle head, which is further forward then the forecastle, and we sat there. And after sitting there for a while, Henry Scott came forward. I peeped out and saw the engineer on the weather side of the quarter washed in blood.

Q. Describe how he was washed in blood.

A. Blood was on his face and on his shirt, very fresh.

Q. Where was he standing?

A. He was standing opposite the spanker rigging.

Q. Then what did you see?

A. I saw Henry Scott on the house with a gun in his hand, walking backward and forward, talking to the engineer for half an hour.

Q. What did you hear him say?

A. I could not hear what was said, as we were too far. Scott was on top the house, and the engineer, all bloody, was on deck, holding up his hands and look like he was pleading.

Q. Then what happened?

A. After a while Scott came off the house and both of them went to the lee side. I jumped down, and just then heard a shot and a splash in the water, and heard the engineer sing out as he went astern.

61 Q. Scott was on the house and the engineer below on the deck. The engineer permitted Scott to come down and kill him, and did not do anything to kill Scott.

A. The engineer appeared to be begging.

Q. Why did Scott have to shoot him?

A. I don't know.

Q. When the engineer went overboard, what else did you see?

A. Scott and the mate tussling.

Q. The mate then appeared?

A. I don't know where he came from. Seems as though the mate came out of the galley.

Q. Then the mate and Scott came together?

A. I don't know, but I saw them wrestling.

Q. What had Scott done with his pistol in the meantime?

A. Scott had the pistol in his hand.

Q. Had a pistol—did not shoot—but was wrestling?

A. He probably shot him below, as from the way the mate was acting he appeared to be wounded.

Q. Had you heard any shooting up to that time?

A. No.

Q. They were wrestling?

A. No—Scott was trying to shove him overboard and he was trying to hold back. Finally he shot him and threw him overboard.

Q. Where were you?

A. I was forward.

Q. Where was Sawyer?

A. Forward.

Q. Where was Cokeley?

A. At the wheel.

Sawyer started to go, and when he got between the main and fore rigging, Scott sung out to him to go back.

Q. You mean to tell the court and jury, that you and Sawyer and Cokeley were aboard that ship, and you saw the mate and Scott hugged together in a wrestle, and that you could not have come forward and rescued him and killed Scott.

62 A. They were not hugged together.

Q. With three white men and three colored men, or even with three colored men, you could not have overcome Scott?

A. I don't know—I was below.

Q. I thought you saw it?

A. When I was on deck I had not seen the captain or the cook.

Q. With yourself, Sawyer and Cokeley, could you not have saved the mate's life?

A. The man was armed.

Q. Were there not plenty of bludgeons, clubs, or sticks lying around?

A. There were no clubs. Ship was loaded with heavy lumber.

Q. Were there no oars on the boats? You could have killed Scott with an oar, billy, or anything of that kind. [No answer recorded].

Q. Well, come to the next shooting?

A. About 8 o'clock, Sawyer went to the wheel, Cokeley came forward, and Henry Scott ordered us to put water in the boiler. Scott was walking back and forth, and after a while I heard shooting somewhere under the deck.

Q. Where is the boiler?

A. In the engine room; but we were putting the water in from the top.

Q. Three men killed, and you stopped to put water in the boiler?

A. I saw him kill the engineer and the mate.

Q. After putting in the water, what did you do?

A. Before we got through we heard shots under the deck, and then saw Scott walking back and forth and heard further shots.

Q. Where did the shooting appear to be?

A. Seemed to be under the deck—somewhere in the galley.

Q. How many shots did you hear?

A. Can't rightly say how many.

Q. What did you see next?

A. After a while saw Scott come with the cook in his hands and throw him overboard.

Q. Then what happened—what did you see Scott bring out?

A. Did not see him bring out anything.

Q. Did not see Scott bring anything out of the galley or engine room?

63 A. No.

Q. What did you see him bring out of the cabin?

A. Nothing.

Q. Did you not see that jar of blood he brought out?

A. No, sir.

Q. Did you not say a while ago that you saw him bring out a jar of blood?

A. No, sir.

Q. Did you not say so in the commissioner's court?

A. No, sir.

Q. What else then happened? Go ahead.

A. Scott then came and said, "Boys, you all will have to do as I tell you to, or else I will kill every one of you."

Q. Before you get to that, now, let me ask you if you saw any sign of blood on the deck?

A. I saw some blood on the forward part of the mainmast, which I have never stated before, and I saw Scott with a broom cleaning up. I have never stated this before.

Q. What time was that you saw him scouring up that blood?

A. Can't rightly say—think about half past seven.

Q. What kind of a broom was it he used?

A. Just a common broom.

Q. Did he have to use both hands?

A. Yes.
Q. What happened next? Did you help him?
A. No, sir.
Q. How many shots altogether did you hear?
A. I can't say.
Q. Did you not state to Captain Stetson and before the commissioner that you heard him shoot the engineer twice?
A. No, sir.
Q. You said you heard two shots before he came up, and you saw him shoot the engineer twice?
A. No, sir.
Q. That an hour later you heard more shooting—at least two shots?
64 A. Yes.
Q. And then you saw him shoot the mate twice?
A. Yes.
Q. And then later he shot the steward twice first, and then the last time he shot the steward four times.
A. No, sir.
Q. You say, now, you can't tell how many shots you heard?
A. Yes.
Q. How many pistols did you see?
A. Only the one which Scott had. (He had two on board.)
Q. What kind of pistol was it Scott had?
A. I can't say.
Q. How did he carry it?
A. He had it hung at his waist.
Q. That was all you saw?
A. All I saw at that time. After shooting Cokeley we took away another one from him.
Q. What happened after that?
A. He said, "You fellows do as I tell you to, or I will shoot every one of you." He said the best thing for us to do was to let go the big boat, and fill it full of water, and we would tell the people we struck a gale of wind, and the captain says, boys we will leave the vessel, and when we were about 200 yards off the boat gets swamped and we swim back—and we agreed to it.
Q. Who lowered the boat?
A. Don't know; I was forward, and Sawyer and Scott was aft and Cokeley. I suppose Scott and Sawyer lowered the boat, as Cokeley was to the wheel. Sawyer and myself and Cokeley was talking together, and we thought the best thing to do was to get Scott down and tie him. I ask them if they think we can do it, and they say, wait for a good chance. So when they went to lower the boat, I don't know how they held him, but I hear them sing out while I was eating supper, and I went out and saw two of them had him down, and then they chain him on the cabin.
Q. Did I understand you to say that Sawyer and Cokeley alone overpowered Scott and tied him?
A. Yes.
65 Q. But even with them, and then the captain, mate, engineer, cook, and all of you, could you not have done the job quicker?
(Objected to by counsel for defense, and not answered.)

Q. I will ask you this: Why was it you did not have as good a chance—and a better chance—to overpower Scott when he was down in the cabin? All you had to do was to go and shut the door and you would have him imprisoned.

A. He would shoot us, and he could break out the door or windows.

Q. When he was scouring that blood up, with both hands on the broom, did you not have an opportunity?

A. He ordered us to stay forward He had a gun.

Q. You seem to be mighty afraid of guns. Had you never seen any guns before?

A. I saw the big guns they used to kill whales.

Q. Guns are dangerous.

A. I know they are dangerous. I never saw any guns until I came to this country.

Q. After they were all killed what time did you eat breakfast; or did you eat breakfast before they were all killed?

A. Did not eat any breakfast until about half past eight.

Q. Who got the breakfast?

A. Scott told Sawyer to go and make some coffee.

Q. Is coffee all you had?

A. Only had coffee and bread.

Q. Did you all eat together?

A. No; Sawyer relieve' Cokeley at the wheel, and Cokeley and I had ours, and Scott had some, and then I relieve' Sawyer and he got his.

Q. What time did you have dinner?

A. About 12 o'clock.

Q. What are the usual hours between breakfast and dinner?

A. From about 7.30 until 12 o'clock.

Q. What did you have for dinner?

A. We had some oysters and batter bread.

Q. Who cooked dinner?

A. Henry Scott.

66 Q. Who peeled the potatoes?

A. He ordered me to peel some for dinner.

Q. Did you have any wine for dinner?

A. No, sir.

Q. Did you have any bay rum?

A. No, sir.

Q. See any brandy?

A. No, sir.

Q. Did you all eat dinner together?

A. No, sir. Three went and eat together. I was at the wheel at dinner time, and the other three eat together.

Q. What time did you eat supper?

A. The usual hour, I think—5 o'clock.

Q. Who cooked the supper?

A. Robert Sawyer.

Q. Did you eat supper together?

A. No; each man go and eat——

Q. It was after supper that Scott was tied?

A. Yes.
Q. What time?
A. About 6 or a quarter past 6. It was just going dusk.
Q. Did you go down in the pantry?
A. No, sir.
Q. Did you see any books torn up?
A. No, sir; but I saw Scott throw some papers overboard.
Q. You don't know what they were?
A. No, sir.
Q. How much money did you find that the captain had?
A. Don't know anything about that. Did not go into the cabin.
Q. How much money did you find that the mate had?
A. Don't know anything about it.
Q. Didn't you know the mate had $75.00?
A. No, sir; don't know anything about that.
Q. How much money did you have when you got to Southport?
A. I had $5.66. That was all, and I could prove it.

Q. Do you recollect the clothes that Scott had on that day?
67 A. Yes, sir; he had on an undershirt alone, one pair of pants underneath and one outside.
Q. Has he got on the same shirt now?
A. I don't know.
Q. When you went aboard the "Blanche King," the captain did not want to receive Scott unless he was bound?
A. After the boat got alongside he asked if we had him tied. We said yes; and we had to loosen him to bring him as we had him tied to a plank. We had him tied with a rope, with one hand at each end of the rope. The mate asked if we had him tied, and we said yes. He said, tie him good.
Q. Did you not tell the mate of the "King" that it was no use to tie him, as he was harmless?
A. I don't recollect that. He asked about the gun and we said we took it away from him.
Q. Did you not tell Captain Taylor that it was no use to tie him, as he was harmless?
A. Can't recollect.

Witness further examined by counsel for defense PESCHAU.

Q. If you told the mate Scott was harmless, that was after you had taken the guns away?
A. Yes; that was after we took the guns.
Q. The district attorney asked why you did not go to the assistance of the mate and the engineer—why was it?
A. We were afraid of the guns.
Q. Did you capture and tie Scott at the first opportunity you had?
A. Yes.
Q. The district attorney asked why you did not overpower Scott when he had the broom; was he sleeping?
A. No.
Q. He has asked you, when he went into the cabin, why you did not go in there and overpower him?

A. He told us to do as he told us, and never allowed us to go into the cabin.

68 Q. He asked you if Cokeley would not have had to pass the shooting to go to the forecastle and tell you and Sawyer—could he not have passed on either side?

A. I don't know where the shooting was, but he could have passed two ways.

Q. He further asked you if you saw the captain go down the stairs, and asked you if the cabin stairs were not in plain view—could not the captain, or somebody else, have gone the other way and not attracted your attention?

A. Yes.

Q. Where are the other entrances to the cabin located?

A. One forward on the starboard side and one near the wheel.

Q. Would you have to look over the cabin or through it to see these entrances?

A. Yes; would have to look over it.

Q. How high is the cabin above the deck?

A. About three or four feet.

Q. Did Cokeley have anything to do with the mutiny?

A. Don't think he had anything to do with it while we were together, so far as I know.

Q. Any time after the killing, did you do anything at the command of Scott, except through fear?

Q. Did you take any part in any of the killing?

A. I took no part whatever in the killing?

Q. Did you assist him in killing anybody?

A. No, sir.

Q. Was Scott bound before the signal lights were put up?

A. Yes.

Q. After he had killed Cokeley?

A. He was bound two hours before he killed Cokeley.

Q. After binding him you tried to signal a steamer?

A. Yes.

Q. Have you ever been in any trouble before in your life? Ever been arrested?

A. No, sir.

69 Q. Do you believe in God?

A. Yes, sir; I never go to sea without my Bible. Some of the men saw me have it.

(Witness stood aside.)

Testimony of Adams by stenographer: Robert Sawyer, one of the defendants is called, and after being warned and told that he need not say anything that would incriminate himself, he is sworn and testifies in his own behalf, as follows:

ROBERT SAWYER to the stand.

Direct examination by counsel *by counsel* for defense, Peschau.

Q. Sawyer, taking the trip from Mobile to Philadelphia, tell his honor and the jury everything that occurred on the vessel leading up to the killing, within your knowledge, between the time the vessel reached Mobile and was brought into the Cape Fear?

A. On the 23rd day of September, we leave Mobile; I will go back and start from the time we got to the bar, on Saturday night; don't remember the date; Sunday morning we towed up to the quarantine station and stayed until Monday; the doctor came aboard and examined everybody, and sent them forward, barring the man who was sick with fever; on Monday afternoon we towed up to Mobile, and lay in the stream until Tuesday afternoon.

Q. From Mobile to Wilmington; tell about the trip?

A. We started from Mobile on the 23rd day of September; the day we were to leave the tugboat came, and Scott was not there, and we waited about two hours, and the captain after a while went up to the dock to see if he could see Scott; I believe captain went one way and Scott came another; by and by Scott came, and then the captain came back; then we started; captain said before Scott came, if he knew where he could get another man just then he would not wait a second on Scott. Finally we started and towed down and had no trouble at all. On the 6th day of October, I believe it was, we had a gale which carried away our topmast, which was broken in two places, and we had expected it to go down at any time. We cleared up the wreck, and after that we had many sails carried away. On Saturday morning the captain command me to go forward and call the watch out to reef sails. I went and call up, and after while Cokeley came along and say to me, I could not wait on that man, I wait ever so long and could not stay any longer, "so I came out." When captain came up on deck, he say where is the other man, and Cokeley say he coming soon. Well, we take in the mainsail before Scott got there. We take it in and make it fast. Then we went to the mizzen. Captain went on the starboard side and lower down, and I reef on the other and then hoist it up again. We went to the fore and captain went on starboard side, and I went on the port and met Scott there. When I met him, I let him stay there and went to the other side to see when the captain was ready to stow away. Captain said, John, I sent you to that halyard, so I went back.

Q. Come down to the time of the killing?

A. On the 10th day of October, we were on deck from 12 to 4 in the morning, me, Sawyer, Arthur Adams, and Capt. Rumill, on the starboard watch. I had the wheel from 12 to 2, and Adams take the wheel from 2 to 4. I went on the lookout. Eight bells was struck, the watch turned out, Scott relieved me at the lookout, and Cokeley went to relieve Adams at the wheel. Before I came down I saw the captain in the engine room. He was firing up because the vessel was leaking, and he was there to relieve the engineer. About five o'clock, coffee time, we turned in and went to sleep. When Adams came from the wheel, he said, I did not know the captain was sleeping. I said, captain is not below sleeping, he is in the engine room. It was 12 minutes past four when I struck eight bells. It takes about ten minutes to get out. After we had turned in to go to sleep, Cokeley come running forward and said, turn out, boys, they are shooting; don't know whether it is the captain or Scott. I rushed to the forecastle door, Adams was behind. Cokeley stood there for a minute or two and then Scott came to the door. I say to him, what the trouble, Scott; he said, never you mind the

71 trouble, I am going to shoot every s—— of b—— aboard this vessel. Then about a minute later he came and ordered Cokeley to go back to the wheel. I was frightened. A few minutes later I hear some shooting on the deck load, and I went out and looked under the fore-boom and saw Scott on the starboard side of the mainmast, and the man he was shooting was on the lee side, and by his build and hat I described it was the chief; and I say, Scott, what is you doing; and he turned around and said never you mind, get back; and I said for God sake don't shoot me, and he fired at me. A little later, Scott came back and said, Sawyer, you and Adams come out and screw up this main and spanker topsail. I was frightened so I could not move. Then Scott went forward and came back again and say, aint you all going to do as I told you? I went out to the main topsail, and when I got there he said, I don't want you fellows to have a thing to do with this; I have done it all myself. All I want you to do is to do as I tell you, or I am going to kill you. We fix up the sails, and when we came down Scott met me and said, now I don't want you fellows to have nothing to do with this, and when we get to the port I will tell the white men I did it. We will put into Brunswick, Ga., or Savannah. He then said go forward; so we went into the forecastle. By and by Adams sung out, look at the chief; when I went I saw the chief, his shirt was full of blood, and the way he was standing, it seemed he was begging, and Scott was on the house walking backward and forward. We could not hear what they were saying, but it look like Scott was bidding the chief to go overboard. They stayed there about half an hour. Bye and by Adams said, look, he is going on the lee side with him. Before I could get there I heard a report, and just after that I heard the chief calling astern. I did not state this in Southport. Scott came forward a little later and bid me to make some coffee. I said, Adams, you go, I feel too bad. Scott said, why can't you go; I said I feel too bad; but anyhow I got up and started to go. When I got up on the deck load, I said, Adams, you go. So Adams went down and tried to kindle the fire, the coffeepot was on the stove. Bye that time we went forward. Adams was somewhere on the rail,

72 I was down on the deck. Adams said, look at him and the mate fighting. I stood and looked a little while and saw them fighting. Scott shoved him over the rail, and they were standing there for some time. I said, Adams, come, lets go aft; and he said, Sawyer, don't go over there; we will get shot. I heard the mate sing out pleading. I said, Adams, I can't stand it; I am going there. I got part of the way, when Scott says, where are you going; and said, get back. By that time the mate saw me, and he called out, Sawyer, for God sake help me. I went back forward, because I could not go to the assistance of the mate for fear Scott would shoot me. The reason why I made the second attempt to go to Scott was, because I thought his gun was then empty. Then I heard Scott say, "You won't go overboard, eh," and then he shot him twice and took him up and threw him overboard.

Not a very long while after that, Cokeley, who was at the wheel, struck eight bells, and I went and relieved him, and he came forward. I saw Scott on the house, and then he came over by the half rail, and was calling up one of the watch. He came over to me and said, you fellows got nothing to do with this, and when the white men ask I will

tell them I did it. I said, no, we don't know anything about it. By and by he came aft again, and was standing near the wheel, and he said, "that cook is down below yet—I am going to get rid of him quick." He went forward where Adams and Cokeley were, and after a while he came back again and went down in the galley, and we heard two reports in succession, and then he came out and went forward again. Then he came aft and went down in the galley and came out again, and in a few minutes more went back to the galley. Shortly, I heard four reports in succession. He then came out and went forward, came back and went down in galley, and when he came out that time he had the steward in his hands—I know it was the steward by his size—and he throw him overboard. He then went down in the galley for some little while, and came out with a stone jar in one hand and a bucket in the other and went to the rail and let the stone jar go over, and take the bucket this way and pour it out, and I saw it was a bucket of blood. That was the last of the steward. After that he went forward. At dinner, Scott made meat oysters and bread and put in pot. I don't know whether
73 he ate any or not. Adams relieved me at the wheel and I went and got some and went on the forecastle head where Cokeley was. I was so scared I did not know what to do. I hold my plate up to ask Adams if he want some, and I go and relieve Adams and he came back to eat. At supper time Scott told me to make supper, and when I went down in the galley I saw only some potatoes which he had told Adams to peel in the morning, and he came to the door and told me just where everything was; so I made some hash and some tea. About 5 o'clock or little more, I got a little on my plate and some bread and a cup of tea, and had what I wanted and put my plate up. Scott went down second and then Coakley. After that Scott said to me, I think we better let go that big boat; and I said, no, let's go a little further in. Myself, Adams, and Cokeley had done arranged to hold him down. Cokeley thought we had better do the same thing. I told Adams and he agreed. We agreed that on the first opportunity we would hold him down. Well, when Scott said let go the big boat, I said, no—I wanted to hold him until we got a good opportunity. Scott was not there five minutes before Cokeley went and took the wheel. Scott then came to the big boat to get it ready. He did not call me. I told them we would seek an opportunity to hold him. So I stuck right close by him, making like I was helping him. He sent me to get them crackers (?). I went to do it, but could not get them loose, so I went back to Scott and said, lend me your knife, so I can cut the strings. Then I went back to help him with the boat and look for a chance to hold him down. I was at the forward end of the boat, and he said, slack down a little. Then we made fast, and then slack down a little more. He got up on the rail again, and I was doing something in the boat, and then I jump on him and bind him, and we fell to the deck. Cokeley was right there, and Adams came, and we tied him with a chain. He said, don't tie my hands too tight. We put canvas around his hands and feet, and we take him from there and put him on the steering gear. He said, put me on the house, and we did. He said, I did not think you fellows would do me like that. He said, I ought to have shot all of you negroes this morning. We are all in this thing now, but I know you did nothing about it, and I can tell nothing about it but the truth. He said he wanted his coat

74 and blanket. We gave him a quilt and his overcoat, and spread them for him. The coat concealed his hands. We did not know he had two guns. Then Cokeley was at the wheel and Adams on deck, and I was looking for a light, but I could not see any. A while later I saw a light. I went forward and went up in the rigging, and I saw it was a steamboat light and I came down to get a signal. Just then I heard two reports and just after the reports I hear Cokeley say, "O Lord, I am shot." We run and when we got there we find Cokeley hugged on top of Scott. I saw the gun in his hands and I made right for it and held his hands. One shot went off while we were tussling. By this time Adams came and took Cokeley off Scott and set him up, and then we had to beat Scott's hands to get the gun away. We got it away and tied him some more. Cokeley was saying "O Lord, I am shot." We gave Cokeley some salt water. I saw the steamboat approach and I say to Adams, Go and get red light and red signal the steamer. We had Scott tied to a plank. I take the red light and signalize to the steamboat, but the steamer went by. By and by, I go down on the quarter, and I say, Adams, here is another sail, and we signalize her. We went over and Adams took the light, and I told Adams that Cokeley was dead. We came back to signal the schooner, which was Captain Taylor, and in about 15 or 20 minutes the schooner was up to us and I hail, and when they answer I said, For God's sake, come to our assistance; we got a man here who has killed the captain, the mate, the engineer, and steward, and just now killed a sailor. He said, Where is the man? and I said, We got him tied on the house, and he said, All right. When they come to us the mate stop off a good ways and says, Is you all going to be taken off? and I said, Yes, sir. The mate says, Where is the man? And he said, You all come on, and I said, What you going to do with the man on the house? I said, Loose him? He asked me if there was any danger, and I said no. It was a good while before he came close. He says, Is the man got a gun? and I said, he had two guns but we got them away from him. So he said, bring him. The mate says, Have you got him tied? I said no. Then he says, Tie him. So we tied Scott. I got in the boat and left Adams. After we had been
75 on the boat about 5 or 10 minutes I handed the mate the gun which we had taken away from Scott—the last one. They put me in irons, and the rest, and they put us below the lazarette hatch. Before they left us the captain ask where was our captain, but I could not give any clear statement, as I had not seen him. Then he asked Scott, and Scott told him the captain had been killed and thrown overboard. When we got into Southport the doctor came aboard and wanted to know if all the papers were all right, and Scott said yes, but I said, Doctor, some papers has been torn up—I don't know what they were, but I saw Scott tear them up.

Q. Now you have been in jail since that time?

A. Yes.

Q. Going back now to the trip down to Cardenas—what trouble, if any, did you have aboard the boat?

A. On the 5th of July, myself, Scott, and Cokeley joined the boat, and on the 6th day we went aboard—myself, Scott, Cokeley, and Adams. We had been out about 7 or 8 days when Scott was at the wheel, and by

and by he rung eight bells. Before Cokeley got to the wheel, he see Scott coming forward. Scott said he had to do a job, and asked the captain to hold the wheel. He went back to the wheel and Cokeley came forward and said Scott had struck the captain.

One Sunday I turned out at 12 o'clock and went aft to get some water to wash. The steward said to me, How many buckets of water you all going to use to-day? I said, This is the first time I have been here after any water; and he said, That bucket has been aft here four times to-day. I said, I dont know anything about that, but I have only been once, and so he said I was a liar. The cook came on the starboard and I thought he was going to hit me, and I put down the bucket; but he never raised his hand or said another word. By that time the captain look around and said, Go forward John. I took up the bucket and went forward. The cook said, And I am going to put you on your allowance of water; and I said, Well, you will have to put me on my allowance of everything else. The captain said, All-right John, you will get all that is your due. So I went forward. Next morning we had breakfast as usual and there was no more trouble.

76 One morning me and Cokeley went out and had rice and collards and bread. This was your trip to Cardenas in July—you had no meat—just rice, collards, and bread?

A. Yes. Cokeley went to the cabin though, and ask if that was all there was prepared for our breakfast, and the steward came up and said, what is it—and said that is all, and said ai't that enough, and we went forward.

One day Scott turn out and came to me and said, what kind of grub are we getting—are you satisfied? I said no. Cokeley said no and Adams said no. We said, all right, and there was no more trouble. We carried our grub over and the cook cooked it. We had no hotel bill of fare, but what it was we had enough of it. We had no more trouble until a few days before we got to Cardenas. The mate, Hall, came forward and told Scott the captain wanted him aft, and when he came back he said, what do you think he called me aft for? He take out the log and read some damn nonsense to me, and I walk out. We got to Cardenas on Sunday, about August 5th. Monday morning we got the little boat ready and put the captain ashore. Tuesday we rig up and discharge coal. The cook fixed our food as usual and there was no growling, and if I was dissatisfied there was no complaint. While in port the captain let us get all the water we want. No further trouble.

Q. Did you have any trouble between Mobile and Wilmington on your last trip?

A. No, sir.

Q. With the exception of the time you had the conversation with the cook, you had no cause for complaint against the captain or any person on board?

A. No, sir.

Q. You heard the statement of Scott about buying pistols in Mobile; did you go with him, or know anything about it?

A. No, sir.

Q. Did you have a pistol?

A. I did not.

Q. Did you see any other pistols than the ones you took from Scott and delivered to the mate of the "King"?

77 A. The white handle one was delivered to the captain, and the black handle one was left on the rudder head. Both were taken from Scott.

Q. Did you at any time prior to this, or during this trip, enter into any compact or agreement with Scott, Cokeley, and Adams, or any one, or make up your mind to mutiny on the vessel?

A. I did not, sir.

Q. Did you assist in any of the killing?

A. No, sir.

Q. Why did you not go to the rescue of the officers?

A. I was not armed, and was afraid.

Q. Have you ever been in any trouble before?

A. No, sir.

Q. Where are you from?

A. From Nassau, New Providence—British subject.

(Court took recess until 3.15 p. m.)

Court reconvened at 3.20 p. m.

SAWYER back to the stand, and cross-examined by district attorney.

Q. Sawyer, how old are you?

A. 30 years.

Q. Where were you born?

A. Nassau, New Providence—Bahama Islands.

Q. How long have you been following the sea?

A. Ten years—started in 1895.

Q. What advantages did you have in your raising?

A. I had been to school and also learned ship carpenter's trade.

Q. You can write and read?

A. Yes.

Q. Do you know more than one language?

A. Only know one language.

Q. Can you write well in the English language?

A. Yes.

Q. You have been long enough at sea, and by your raising you know what sailors' rights are?

A. Yes.

Q. You know what the captain's duties are on the boat?

78 A. Yes.

Q. And what is the seamans duty?

A. Yes.

Q. What vessel, prior to the "Berwind" did you sail on?

A. The "Wm. K. Parks."

Q. American?

A. Yes, sir; sailed from Philadelphia.

Q. How long did you stay on her?

A. Two months and 19 days.

Q. What time did you leave her?

A. Can't exactly remember.

Q. How long were you off her before you went on the "Berwind?"

A. About 15 days.
Q. Prior to that time how long had you known John S. Cokeley?
A. I have known him in June gone, one year ago. I knew him in May, but we shipped together in June.
Q. Where did you ship together at?
A. We shipped on the schooner "Jno. E. Deverling."
Q. How long were you together on her?
A. We had been on her two months and four days.
Q. Then what was the next ship?
A. The "Jas. A. Wright."
Q. How long were you on her?
A. Twenty-three days—we got shipwrecked.
Q. How?
A. Got shipwrecked at the Bahama Islands.
Q. Was any of the crew lost?
A. No, sir.
Q. Then where did you and Cokeley next go?
A. From there we went to Nassau.
Q. Where did you ship from there?
A. We came on a Ward Line boat to New York.
Q. And shipped together on?
A. On the "L. L. Pollard."
Q. How long did you stay on her?
A. Forty-six days.
Q. Then?
79 A. Went on sch. "Ed. H. Coles."
Q. How long on her?
A. Went aboard on the 25th of November and left her on the 30th of January.
Q. What was the next vessel?
A. The "Mary F. Barrett."
Q. How long on her?
A. Stayed aboard her forty-two days.
Q. Then next?
A. Next shipped on the "Wm. K. Parks."
Q. And then?
A. And then on the "Berwind."
Q. Was Adams with you and Cokeley on any of these ships?
A. No, sir.
Q. When did you meet Adams?
A. I met him few days before we signed at a lodge house in Phila.
Q. Have you had any prior acquaintance with Henry Scott?
A. Never met him before.
Q. Was anybody with you when you signed up?
A. Yes, sir; Sawyer, Scott, and Cokeley——
Q. Adams was not present?
A. No, sir.
Q. Do you remember the date you signed?
A. The 5th day of July.
Q. What day did you go aboard?
A. On the 6th.

Q. What day did the vessel leave Phila.?
A. On the 6th.
Q. What position were you assigned to?
A. Seaman.
Q. What work—where did the captain assign you to work?
A. Nowhere in particular; anywhere he sent me.
Q. Where did he send you?
A. I was on the captain's watch.
Q. With whom?
80 A. Me and Arthur Adams.
Q. Cokeley and Scott were on the mate's watch?
A. Yes.
Q. You sailed from Phila. on the 6th?
A. Yes.
Q. At that time how were you being rationed?
A. What the captain provided for our daily rations.
Q. Did the provisions come up to what the law says it should
A. No, sir; it did not.
Q. When was the first time you made complaint?
A. I can't exactly say what date.
Q. How many days out?
A. We were about 15 or 20 days out before making any complaint.
Q. 15 days would bring you to the 21st, and 20 days would bring you to the 26th?
A. Yes.
Q. Do you now say that was the first date any complaint was made?
A. No, sir.
Q. What was the first time that you, Scott, Adams, and Cokeley realized the captain was not furnishing you what the law required?
A. We never came together yet and talk together on board about the rations. We simply talk in piecemeals.
Q. You were getting bad rations and not much of it?
A. Yes.
Q. You were also complaining account of lack of water?
A. Yes.
Q. How much water was furnished?
A. We got water whenever the bucket was empty.
Q. How much did you use?
A. We use about two buckets a day for four men.
Q. How much did the bucket hold?
A. Don't know exactly—just ordinary.
Q. You did not get more than the allowance?
A. No.
Q. What rations did you get?
A. Just whatever the master provided.
81 Q. What was it generally?
A. Salt meat, potatoes, and bread.
Q. And that you considered hard?
A. Yes.
Q. And not what the law gave you?
A. No.

Q. You had posted in the forecastle the statutes that showed you the rights of a sailor and the rations you had a right to demand, and that was the reason you all were dissatisfied?

A. No. I only wanted them to do a little better than what they were.

Q. All four of you did not get together and talk it over?

A. No, sir.

Q. At the same time you were dissatisfied and grumbling?

A. Yes.

Q. You went along until just before you got to Cardenas, on July 30. Now do you remember some trouble that you had with the steward on July 30th?

A. I don't recollect the date.

Q. Well, tell what it was about.

A. I went over after some water.

Q. And the steward told you not to use so much?

A. He ask me how many buckets water you all going to use to-day. He said this is four times this bucket been aft. I said this is the first time I have been here with it, and he said, "You are a liar." We had some words, and after that I take up the bucket from the deck and go forward. As I start to leave he walk up close where I was; I saw him coming and did not know what he was going to do, and I put the bucket down, and he stopped, and never said another word. Then the captain looked around and said, What is the matter, John? Take your water and go forward. The steward said he was going to put me on my allowance of water, and I said, If you put me on my allowance of water you must put me on my allowance of everything.

Q. Did you not become very abusive, and call the steward a G— d— white s— b— (No, sir.), and at the same time attempt to strike him?

A. No, sir.

Q. And tried to beat the steward, when the captain stepped in
82 and parted you?

A. No, sir; nothing of that kind occurred.

Q. And then you moved forward, using abusive language, and tried to incite the other sailors to insubordination?

A. Before I took the water, the steward called me a black s— b—; therein you will see where Henry Scott stated in his statement at Southport. I called him another one in return, and then, the captain say what is the matter John—go forward. Then the steward said, I am going to put you on your allowance of water. And when he said that, I said if you put me on my allowance of water you will have to put me on my allowance of everything else. The captain said, all right, John; you will get all that is coming to you.

Q. Well, how long after that before the crew demanded their wack?

A. We never demanded it, sir. No, sir—not until the cook said he was going to give us our wack of water.

Q. Then the other sailors demanded their wack?

A. No, sir.

Q. Did not the entire crew want their wack?

A. I wanted mine and it was weighed out, and the captain said we should get it, and on Monday morning he gave us our food as usual, but said he would not be able to start weighing it until Monday evening.

Q. Then the allowance was weighed out daily?
A. Yes.
Q. How many days before you reached Cardenas?
A. I believe three or four days.
Q. When you got to Cardenas nothing in particular happened?
A. No, sir—the cook cooked our food just as good as before we got our wack, and I don't believe the captain would let the cook fix our food improper—he cooked it all right.
Q. The same steward furnished the wack to you, and cooked it for you?
A. Yes.
Q. You said this morning, something about coffee time. Is that any particular hour?
A. No, sir—no particular hour.
Q. Coffee time is different from the time you eat?
83 A. Yes.
Q. Did you get any money at Cardenas?
A. No, sir. I had $25.00 when I went aboard.
Q. Well, tell anything that happened from Cardenas to Mobile.
A. We left Cardenas morning of 15th, and the mate command us to go up and loosen the topsail. Well, Scott finished before us, and he sung out to hist away. The mate was trying to hist. Captain then sung out to Scott to help the mate pull. Scott sung out he was not going to pull, and said, What you got steam engine for? Captain said, All right, and came and helped the mate himself. Scott came down, and the captain asked him who he was ordering. Cap'n say, All right. After we were out two or three days I went aft one day to get the food or something, and the steward told me that captain had said he must not order out rations, but must let him order it himself. I was satisfied, so I went forward and told someone. At one bell Scott came to me below, where I was working, and said, Ain't you going to the captain to order out our grub? 8 bells was struck. I came up and meet Scott coming aft, and Cokeley, and went to get drink of water. After I got the water I turned back and went with them. We went over—three of us. Adams was at the wheel. We stood up there three or four minutes—Cokeley, Scott, and myself—and Scott called to the captain and said, Come up here; I want to speak to you. Captain came up and say, What you want? Then I spoke to him in an orderly manner and said, Captain, you told the steward not to order out our food. And the captain said, No; I never told him so. He said, I told him we were not going to have a hotel bill of fare on the European plan, and he said, I don't mean to let you order so many different dishes for the steward to cook, because he is got too much to do; and I decided right away, and I said, I will order the grub. The captain said to Scott, You are making all this trouble aboard this vessel; these three men are as good men as I ever had with me. Scott said, You are putting me down as the ring-leader. Captain said, Yes; you are trying to make all this trouble. Scott said, What trouble have I made? Cap'n said, I never said you made any trouble; you are trying to do it. Scott said, I have
84 never seen any Nova Scotia any good yet. The captain said, Who is a Nova Scotia? Scott said, You. Captain said, Well, I

have got a Nova Scotia man here with me now, as good a man as I ever had. So the captain turned around to Scott and say, You never mind whether I am a Frenchman.

Q. In that conversation you were the man who was demanding that your food be weighed out by the cook—you were the man who made the complaint?

A. No, sir; there was no complaint about that.

Q. What was the complaint?

A. About ordering the food.

Q. You were the party that was complaining?

A. Yes.

Q. Then you went on to Mobile?

A. Yes.

Q. After being towed in, etc., how much money did you when you got to Mobile?

A. None; except on Tuesday morning I wanted to post a letter, and I passed it to the captain to post for me.

Q. What was the first day you went ashore?

A. Tuesday.

Q. You got there Monday?

A. Yes.

Q. Who went ashore with you?

A. I went ashore by myself.

Q. Adams was sick?

A. Yes.

Q. Who else went ashore?

A. Scott went before me.

Q. What night was that you and Cokeley and Scott went on Commerce street to take a drink?

A. I never took a drink.

Q. Was not in a barroom?

A. On Tuesday night Cokeley and I went ashore; Scott went by himself. After I was in Mobile nearly two weeks I met with one
85 Ed. Devaney, and he and I was together one night, and he came aboard next day and stayed until we were ready to go ashore. Scott went ashore at the same time, but not with us.

Q. Was that the night you bought the pistols?

A. We never bought any pistols.

Q. You did not buy this pistol?

A. I did not.

Q. Did you see any of the officers aboard that ship with a pistol anything like this?

A. I did not.

Q. Did you see the captain with one?

A. I did not.

Q. Did you see Henry Scott with one before the tragedy?

A. I did not.

Q. Then you deny the statement of Henry Scott that you bought three pistols in Mobile?

A. Yes, sir.

Q. How much money did you blow in at Mobile?

A. I spent $11.05.
Q. Did you buy any clothes?
A. No.
Q. How did you spend it?
A. Going around.
Q. Did you not spend any for a pistol?
A. No, sir.
Q. How much money did Adams have?
A. I don't know.
Q. How much did Cokeley have?
A. Cokeley had $10.00.
Q. Did you see him spend any money for a pistol?
A. No, sir.
Q. I will ask you, if down in the forecastle, just before you left Mobile, you did not show Henry Scott a pistol and say that you had bought three, and that if any more of that trouble occurred aboard the boat you would protect yourself?
A. I did not.
Q. Did not see any of them with a pistol?
86 A. No, sir.
Q. In the forecastle, you and Cokeley and Scott and Adams all bunked together in a small room?
A. Yes; we all bunk on one side; Cokeley and me near together and Adams and Scott further up forward.
Q. You can generally see what belongings each other have, and everything else?
A. I can't say that, as you can't know what a man has got in his bunk without searching it.
Q. If they had anything in their hands you could see it—tobacco, or cigars, or anything else?
A. Yes; if it were taken out we could see it; but not always.
Q. How many days did you stay in Mobile?
A. 26 days.
Q. You saw Adams, Scott, and Cokeley every day?
A. Yes.
Q. All of you worked every day?
A. Yes.
Q. You knew the captain?
A. Yes; Captain Rumill.
Q. He was aboard?
A. Yes.
Q. Did you know the mate?
A. Yes; John Hall.
Q. The engineer?
A. Yes; L. S. Smith.
Q. The steward?
A. Yes; Falbe(?).
Q. They were the same officers from Philadelphia and you had the same four seamen?
A. Yes.
Q. Now, did that ship touch any other ship after it was turned loose by the pilot?

A. No.

Q. Did you pass any other ships?

87 A. Yes; many.

Q. Did they come close enough for anybody to get off the "Berwind?"

A. No.

Q. After you set sail, you were still served with your wack?

A. Yes.

Q. You sailed on the 6th day of August?

A. No, sir; sailed on Sept. 23rd.

Q. How long was it before the topsail broke?

A. We were out quite a while.

Q. How long after the topsail broke before you got in the gale?

A. The topsail was carried away in a squall on Friday evening, and then during Friday night the gale came on.

Q. What damage did it do?

A. Carried away the rudder head on Sunday night.

Q. The tragedy occurred on Tuesday?

A. Yes.

Q. How long did the gale last?

A. From Friday night, all day Saturday and Sunday, and Monday there was heavy seas.

Q. Then Monday night you were all there, and you all got your wack?

A. Yes.

Q. Now, Tuesday morning?

A. I was on the starboard watch—Adams, Capt. Rumill, myself, and Sawyer. The captain was out right much, and was helping the engineer on account of the vessel having sprung a leak. Adams was on the outlook from 12 to 2.

Q. Who was at the wheel from 2 to 4?

A. Adams.

Q. Who was at the wheel from 12 to 2?

A. I was.

Q. During the watch from 12 to 2, when you were at the wheel, I will ask if you saw on deck anywhere Henry Scott or Cokeley?

A. No, sir.

Q. From 12 to 2 did you see the mate, engineer, or captain come out of the cabin?

88 A. Saw the captain, but not the mate or engineer.

Q. At 2 o'clock you were relieved and went on the lookout?

A. Yes.

Q. And you stayed there, and Adams went back to the wheel, and Adams was in the same position that you had been and could have seen any body who came out or went into the cabin?

A. Yes.

Q. Adams was at the wheel from 2 to 4, in the same position that you had been in for the two hours previous?

A. Yes.

Q. During that time you were on the lookout?

A. Yes.

Q. Did you see Henry Scott or Cokeley come out of the forecastle?

A. No, sir.
Q. How far was the lookout's place from the forecastle door?
A. No particular distance.

Q. You could have seen any body come out?
A. No, sir; could not see unless I was on the port side.
Q. Do you walk up and down the whole deck?
A. Yes.
Q. Sometimes you sit down and sometimes you walk?
A. Yes.
Q. Did you see Henry Scott on deck during that time?
A. No, sir.
Q. Did you see the captain?
A. Yes; saw the captain in the engine room.
Q. Did you see the engineer—during that time—did you go into the engine room?
A. No, sir.
Q. Your watch was off at four; whose duty was it to strike the bell?
A. The man on the lookout.
Q. What time did you strike it?
A. I struck it when I hear the bell aft.
Q. Who strikes the bell aft?
A. The man at the wheel—Adams.
89 Q. What time did that bell strike?
A. It is supposed to strike 10 minutes to 4. Adams have told me he struck 8 bells at 12 minutes past 4. 8 bells should strike at 4.
Q. Then that was a difference of 12 minutes?
A. Yes.
Q. Then you struck the bell, and Cokeley and Scott turned out, and you turned in?
A. Yes.
Q. At that time where were you standing—when you struck the bell?
A. I was on the starboard side.
Q. When you passed were you near the forecastle on the starboard side?
A. Yes.
Q. When you went on the starboard side, what did you see in the engine room?
A. I saw the captain in the engine room.
Q. How could you see him?
A. There is a window through which I could peep and see every thing going on. I heard him shoveling coal. When I came by I did not look, but went by and went into the forecastle.
Q. You got there first—ahead of Adams?
A. Yes.
Q. What time?
A. It supposed to be 22 minutes past 4. It must have been that time.
Q. You should have gone in at 4 o'clock?
A. Yes.
Q. How long after you were in the forecastle before you heard trouble?

A. I should say about 5 o'clock. It may have been after that. It was somewhere about coffee time.

Q. What attracted your attention to the trouble?

A. Cokeley. I was asleep, when Cokeley came and roused us out.

Q. At that hour you say Cokeley came—where was his station?

A. At the wheel.

90 Q. He said what?

A. He said you all turn out—they are shooting aft—I don't know whether it is the captain shooting or Scott.

Q. When Cokeley left the wheel and came to notify you all at the forecastle, would he not have to pass anybody shooting on the deck?

A. It may have been on the starboard side.

Q. How wide is the deck? How wide is the vessel?

A. About 40 feet.

Q. The cabin is about 3½ or 4 feet high?

A. Yes.

Q. Anybody going up to the forecastle would be bound to see any shooting that was going on?

A. Yes.

Q. Cokeley under those circumstances came to you and said they are shooting aft, and I don't know whether it is Scott or the captain; whether Scott is shooting the captain or whether the captain is shooting Scott?

A. Yes.

Q. What did you do?

A. I rushed to the door, and Cokeley was standing there, and in a few minutes Scott came forward.

Q. If Scott was engaged in shooting, how long would it take him to come to the forecastle door?

A. I don't know.

Q. If Cokeley was aft, how long would it take for him to rush from aft and come forward?

(Objected to by counsel for defense—objection sustained.)

Q. Cokeley told you there was trouble aft, and before you got out of the forecastle Scott appeared?

A. Yes.

Q. How long before you saw Scott?

A. About five minutes.

Q. How long would it take you to walk from the forecastle to the cabin?

A. It would not take a minute.

91 Q. After that, what was the next thing you did?

A. I stood at the door.

Q. Did you not state to the commissioner at Southport and to Capt. Stetson that you then went and laid down?

A. I did not.

Q. What was the next thing you heard?

A. Just after that Scott command Cokeley to go back to the wheel, and a little while later Scott went on the deck load. I was frightened.

Q. You are easily frightened?

A. Not generally, but I was frightened then.

Q. What happened then?

A. I stayed there and Scott went up on the deck load, and not very long after I heard shooting up on the deck load.

Q. Now locate where that was?

A. I came out and got up on the deck load, and just then I saw Scott at the mainmast shooting a man.

Q. Where is the mainmast?

A. Just forward of the galley.

Q. You saw him shooting a man?

A. Yes, sir.

Q. How many times did he shoot?

A. I can't say; I got up and looked under the boom and asked Scott what the trouble was, and he said "Never you mind; get to hell back in that forecastle!" I said "For God's sake don't shoot me!" and he fired at me and I run back.

Q. Did you see the shot he fired at you?

A. No, sir; I never saw it. That was the first shot I heard.

Q. Was it daylight then?

A. No, sir; day just beginning to break.

Q. How far was Scott from you when he pointed the pistol at you?

A. Not very far—a little on the starboard side of the mainmast.

Q. It was not daybreak?

A. Just beginning to clear away.

Q. Was the moon shining?

92 A. I can't remember.

Q. That was the first shot you heard?

A. Yes.

Q. Did you hear any in the cabin?

A. No.

Q. Following that, how many shots did you hear?

A. When he have shot the engineer—I never heard any more.

Q. What became of the man that was standing before him that he was pointing the pistol at?

A. I can't say.

Q. Who was he?

A. I think he was the chief (engineer). Judging from his clothes, I think it was the chief.

Q. Was he bloody then?

A. I could not see him good.

Q. Did you not tell before the commissioner at Southport, and did you not tell before Captain Stetson twice, and did you not tell here this morning on your direct examination that at that time the engineer was bloody?

A. No, sir; I said he was bloody when he was at the spanker rigging and Scott was walking on the house.

Q. What became of that man then?

A. I don't know.

Q. Did you hear the report of a pistol?

A. Yes, sir; one.

Q. That was the one which was fired at you?

A. No, sir; one besides that.

Q. Did you see any man fall from that shot?

A. No, sir.

Q. What became of that man?

A. I don't know. We were in the forecastle, and a little later Adams direct my attention, and say, look at the chief washed in blood.

Q. From the time just before daybreak, when it was dark and you could not see the blood, how long after that before you saw the engineer washed in blood?

93 A. It was about half-past 6 or 7 o'clock.

Q. Daylight had broke good?

A. Yes.

Q. At that time, did you see the captain?

A. No, sir.

Q. Did you see the mate?

A. No, sir.

Q. The cook?

A. No.

Q. Now, go on and tell about the time you say the engineer was washed in blood.

A. He was bloodied, but you could see it was not fresh blood. Scott was on the house walking, and the chief looked to be pleading to him for mercy, and Scott appeared to bidding him to go overboard.

Q. The engineer did not walk overboard?

A. No.

Q. Scott then came down?

A. I did not see him.

Q. He came down, did he not?

A. I don't know; I could not see him.

Q. What became of him?

A. I was standing on the starboard side, and Adams was more on the port side, and I was not looking at the time—and Adams said to me, look at the chief, washed in blood. They were there talking about half an hour.

Q. Scott and the engineer were talking half an hour?

A. Yes.

Q. And you were standing listening?

A. Yes.

Q. What happened to the engineer?

A. Adams said, look at the chief. I looked and saw Scott walking back and forth with a gun. In a little while Adams said, look, he is going on the lee side with him. I could not see them. By the time he said that I started to go on the other side so I could see

94 them—but before that, I heard a report, and just after the report I heard the chief calling out, going astern—he was overboard.

Q. Did you not state before the commissioner at Southport and to Captain Stetson that he threw the engineer overboard, or made him jump overboard, and you heard him crying for mercy—did you not?

A. No, sir; I did not.

Q. At that time, when he was thrown overboard, did you see anything of the mate, or the cook, or the captain?

A. I did not.

Q. What time of day was that?

A. About 7 o'clock.

Q. Then you turned in and cooked breakfast?

A. Scott came forward and said, Sawyer you better go and get some coffee or you fellows won't get anything to eat. I said, Adams you go. Scott replied and said, why can't you go. I said, I feel too bad now. A little while later I started to go, and just as I got up on the deck load I said, Adams you make it, I have to go to relieve Cokeley at 8 bells, and then both of us went down in the galley, and we had some trouble in kindling up the fire. The coffee pot was on the stove, and Adams got some coffee and threw in the pot, and after that we went forward.

Q. Who was in the galley?

A. No one.

Q. Was the steward not in there?

A. No, sir.

Q. Then after getting the coffee you went forward again?

A. Yes.

Q. Did you see any blood in the galley?

A. No, sir.

Q. What was the next thing you saw? How long was it before you saw Scott and the mate?

A. Can't say exactly how long. Adams said, O, look at the mate and Scott fighting. I look and see it was so.

Q. How were they fighting?

A. Scott had a gun in his hand, and was shoving him to go
95 overboard. I think the mate held up his fist, and Scott said, O, you want to fight, eh! and he said, no, Scott; for God's sake have mercy. Scott had the pistol in his hand.

Q. You say the mate weighed 145 or 150 pounds and was very active?

A. Yes.

Q. How long did they wrestle, and where were they located?

A. Between the galley and the cabin, on the deck load; closer to the galley than the cabin.

Q. Where were you?

A. We were forward.

Q. Who was at the wheel?

A. Cokeley.

Q. Cokeley was nearer than you and Adams?

A. Yes.

Q. How long did they continue to wrestle?

A. Can't say rightly; but after he tried so long to get him overboard——

Q. How long?

A. About five or eight minutes; then Scott stood off from him and said, ain't you going overboard? and the mate said, Scott, for God sake, have mercy. I started to go and help him, and Adams say to me, come back; if you go you are going to get shot; however, I said I believe Scott's gun is empty, because he did not shoot the mate.

Q. How many shots had he fired, up to that time?

A. I can not say how many; the one he fired at me was all I heard.

Q. Did you not tell Captain Stetson and the commissioner that you heard shooting before you got up the second time, and then two shots were fired into the engineer, and then two shots were fired into the mate?

A. I did not; this was the second shooting I heard when I went up on the deck load.

Q. How many shots had been fired?

A. I don't know. I heard the shot he fired at me, and the one at the engineer.

Q. Go on with the mate?

A. I said, Adams I am going over and find out; just as I get about to the mainmast, Scott said, now you get to hell back forward, and the mate saw me and said, Sawyer, do for God's sake help me; but
96 I turned back and went and stood up where I was at first; up on the deck load, just a few planks from the top.

Q. Go ahead with the mate.

A. Just a little while after that Scott shot him twice.

Q. That made four shots you had heard?

A. That is four besides the first. Then he threw him overboard just forward of the spanker rigging. There must be a little blood somewhere thereabouts.

Q. All that time, where was the steward?

A. I don't know, sir.

Q. How did he get into the galley?

A. I don't know, sir. When we turned out there was no one on deck.

Q. The steward was not in the galley?

A. I did not see him.

Q. You were then on deck, and you stayed on deck, and your eyes were turned towards the galley, and you did not see the steward go into the galley?

A. I did not see the steward since the evening before.

Q. What was done then, after the mate was overboard?

A. Not long after that the man at the wheel, Cokeley, struck 8 bells. I went to the wheel, and I had been there for some time, when Henry Scott came aft. [I forgot to testify to that.] After he killed the mate I was at the wheel, and in a little while Scott came to me and said, look here, when you see me fooling with these white folks never you go nowheres around or you will get shot.

Q. That was after 8 bells struck?

A. Yes.

Q. There was only one white man remaining, and that was the steward?

A. Yes.

Q. How long from the time the mate was thrown overboard and shot was it before there was any other shooting?

A. It was a good while after—about 15 or 20 minutes.

Q. Then what was done?

A. Scott came aft and was calling up the watch; he came to me and said, now I don't want you boys to have nothing to do with this. I don't want you fellows punished for nothing I have done. When
97 the white folks ask me I can tell them I did it.

Q. How long before you get down to the shooting of the steward?

A. After that he went forward to Cokeley and Adams where they were working, and came back where I was at the wheel and said, that steward is down in the galley yet. He must have meant in the store

room, because he was not in the galley. He said that steward is down below there yet, I want to get rid of him right quick—the bastard—shoot him.

Q. Then he went into the galley?

A. No, he went forward and then came back and went down in the galley. Went down there for a while, and then I heard two shots in succession.

Q. That is six shots?

A. Yes. After that he came out and went forward. He came back and went forward again, and the last time he went back he went down in the galley, and I have heard four shots in succession.

Q. That made ten shots in succession?

A. Yes. Then he came out and went forward, and came back again and went into the galley, and when he came out he had the steward in his hands, and went right to the side and dumped him overboard.

Q. Tell me what time the steward got in that galley?

A. I don't know.

Q. Can't tell anything about it?

A. Don't know anything about it.

Q. The galley is a small place and you could see anybody in there if you were to go in or go by?

A. There is a store room at the back, and he might have been in it.

Q. You heard six shots in the galley?

A. Yes.

Q. Then what about the blood?

A. After that Scott went down in the galley, and when I see him come out he had a stone jar in his hand and a bucket in the other; he let the jar go over and then emptied the bucket—the contents of which was blood.

Q. After that, when the captain and all the white men had
98 disappeared—then what did you do? What time of day was it?

A. I should say after 9 o'clock.

Q. You then went to get breakfast?

A. A long time after that Scott came aft and held the wheel, and ask me if I want coffee. I thought I would go, and I went and got some coffee and a bit of bread; I did not feel like eating, and then went back to the wheel.

Q. What time was that breakfast served?

A. I don't know exactly, sir.

Q. Who got it?

A. There was only coffee made.

Q. Then you did not get any breakfast?

A. We had a lot of bread, and Scott told us about the bread in the oven.

Q. Is there a carpet on the galley floor?

A. No, sir; I don't think so.

Q. Did you see any blood in the galley?

A. No, sir.

Q. After breakfast what happened?

A. I went back to the wheel.

Q. What did the others do?

A. They were still on the house trying to fill the boiler.

Q. They had been trying to fill the boiler between the killing of the mate and the steward?

A. Yes.

Q. Between the killing of the mate and the steward you filled the boiler and made coffee?

A. Yes.

Q. You then continued to fill the boiler?

A. Yes; Scott was there now and then—sometimes he was not with them.

Q. Do you know whether he went in the cabin or not?

A. Yes, sir.

Q. If you wanted to capture him, why did you not shut the door?

A. Did not think of it.

Q. If you had wanted to capture him, you could have caged him.

99 A. I don't know, sir; The cabin has got so many windows.

Q. Didn't you know one door was barred by the false rudder?

A. Yes.

Q. Don't you know you could have caged him?

A. I did not think of it.

Q. And you did not think of it afterwards?

A. No, sir; I did not.

Q. After that, what happened?

A. Just from one thing to the other.

Q. Who got dinner?

A. Henry Scott.

Q. What time was dinner served?

A. Can't say readily.

Q. What was the usual hour for dinner?

A. A little after 12.

Q. You had no discussion around the dinner table?

A. We did not serve dinner together.

Q. I will ask if, after you had disposed of all the white folks, whether you, Scott, Cokeley, and Adams did not get together and reckon about what you had done and how you were to manage to escape?

A. Adams told me that Scott told him if we did not do as he said he would kill us and throw us all overboard. Cokeley tell me the same thing.

Q. You did not see but the one pistol?

A. No, sir.

Q. You were still scared?

A. Yes, sir.

Q. You were not frightened half as much in the gale?

A. Yes.

Q. How much do you weigh?

A. 177 pounds.

Q. Very active?

A. Yes.

Q. Muscles well developed?

A. Yes.

Q. You could now stand right up there with Scott and you would be his equal?

100 A. Yes; put him from them guns and I would.

Q. What was the first time you had any talk about how you were going to get clear of this trouble?

A. I saw Adams and he told me that they had agreed to do anything Scott said. Scott said he was going to call us over and tell us what he was going to do. So finally Adams was at the wheel. Scott was aft and so was Cokeley. I was near the main rigging, and Scott beckon to me to come aft. When I got there he said, now you know what we will have to do—we will have to let go this big boat and sink her. Then he asked Adams how much money he had got from the captain, and he said $2.00. He asked me, and I told him I had nothing. He said—them papers—I am going to tear them up—some of the official papers, and some I am going to let be. We agreed with him because he said he would kill us if we don't.

Q. What about the plot to tie him down?

A. We had already made plot to tie him down.

Q. Who was present when that was made?

A. Me and Cokeley, and afterwards Adams. That evening Scott take out his gun and he said, now I could kill you fellows, but there is no good of killing you—he said—you, Adams, and Sawyer going home to get married. After that we all agreed, and we started to get the boat ready late that afternoon to let her go.

Q. For what purpose?

A. Scott said we would tell the people that we take to the boats in a gale, and the boat got swamped, and we got back to the ship, but that the captain and others got drowned.

Q. Was Scott going to fire the ship or water-log her?

A. He said he was sounding her now and then, and said he would like to see about five feet of water in her. He did not say anything about knocking out the port.

Q. Now, Sawyer, I will ask you if this was not the contract and agreement between all of you, that after the storm had swept away the topsail and the rudderhead, that you all concluded that was the time for you to do away with the white people, and say that the white folks got lost. Was not that the agreement?

101 A. No, sir.

Q. And that then you could show the ship's condition?

A. No, sir.

Q. And was it not because Scott objected to that, that you then made up your minds that if Scott was rebellious you would tie him and try to cast the burden of all on Scott?

A. No, sir.

Q. Scott said he was armed, and you three men armed, and you had disarmed him because he rebelled against it?

A. No, sir.

Q. You wanted to put him into your use, and put all the sin and all the blame on this man?

A. No, sir.

Q. You overpowered Scott?

A. I held him.

Q. At that time he had two pistols?

A. Yes.
Q. You took one away from him.
A. No, sir.
Q. Cokeley was at the wheel?
A. Yes.
Q. Then it was you and Adams who tackled this man?
A. Yes.
Q. Who tied him?
A. Cokeley and Adams.
Q. Who took away the guns?
A. I took one away, and afterwards we found he had another one.
Q. Why did you all not overpower him before?
A. We did not have an opportunity.
Q. You did—was not he scrubbing up blood—why was that not an opportunity for you to tackle him?
A. He could hear me coming and shoot me down dead.
Q. Where was Cokeley?
A. Cokeley and Adams were forward.
Q. They could come?
A. He would hear them also.
102 Q. Just about this time, when lowering the boat, you decided to exercise your muscle powers?
A. I told him to wait and not let the boat go yet. I said, let's go a little further in. He said to me, the further out the better. If we would let this boat go further in, they would wonder how far the boat could be from the dead bodies. We complied with all he said, because he would kill us.
Q. On board that ship you had capstan bars?
A. Yes.
Q. What are they?
A. They are what we heave the capstan with.
Q. They are pretty heavy sticks—sufficient to knock anybody down?
A. Yes.
Q. And you also had belaying pins—plenty of them?
A. Yes.
Q. They were right near the forecastle?
A. Yes.
Q. Don't you think that if you (Sawyer), Adams, and Cokeley, and the captain, and the mate, and the engineer, and the cook had all been armed with these things, you could have absolutely demolished Scott?
A. Yes, sir; I believe we could—but we were not altogether.
Q. Did I not understand you to say that the engineer was in trouble for half an hour, even after he was bloody?
A. Yes, sir.
Q. Scott was standing on the cabin, where the cook and mate could hear, and there must have been noise enough to arouse anybody and everybody?
A. No one came up.
Q. Did you not tell Captain Stetson and Captain Taylor that it was Scott's plan to fire the ship?
A. No, sir.

Q. To lower the boat and fire the ship?
A. No, sir.
Q. And let the big yawl go off for the white people?
A. No, sir.

Q. Sawyer, you have never been in such a scrape as this before?
103 A. No, sir. I could show all my discharges and references where I have been aboard various vessels.

Same witness recxamined by counsel for defense, Peschau:

Q. Sawyer, the district attorney has asked you why you did not take both guns away from Scott; why?
A. I did not know he had both of them.
Q. Did you see him with more than one gun?
A. No, sir.
Q. Was that the reason you searched him no further?
A. Yes.
Q. The D. A. asked you why you did not attack him in the cabin; you did not care to run against a man with a gun at any place, did you?
A. No, sir.
Q. You say there were a number of capstan bars aboard?
A. Not many.
Q. You were not in condition to attack a man with capstan bars when he was armed with a gun?
A. No, sir.
Q. He asked you, if all of you could not have gotten together and have overpowered Scott; did you know where they were when the killing first started?
A. No, sir.
Q. You did not know whether they were killed below or not?
A. No, sir.
Q. You merely saw the final struggles?
A. Yes.
Q. Did you know Adams before you shipped on this boat?
A. No, sir; did not know him.
Q. The question was asked you, when the bell struck at 12 o'clock, where was the captain?
A. The captain was in the engine room.
Q. He was in the engine room a little before 4 o'clock, and you don't know what became of him after that?
A. No, sir.

104 Q. You don't know whether Cokeley saw the first shot or not?
A. No.

Q. You don't know whether it was possible for him to see the first shooting or not.
A. No.
Q. He asked you if the mate was an able-bodied man—do you know whether the mate was wounded or not?
A. He may have been wounded—I don't know.
Q. How was that vessel loaded on her deck?
A. She had on a good deck load.
Q. Was it possible for Scott, standing on that lumber, to have overlooked the entire vessel?

A. Yes.

Q. Some questions were asked you about complaints made on your trip to Cardenas. Did you harbor any ill feelings on account of the complaints?

A. I did not.

(Witness stood aside).

R. W. Weeks and Dr. J. A. Dozier, two witnesses subpœnaed by both the United States and the defendants are called, sworn and examined by counsel for defendants, and cross-examined by the United States attorney, as follows:

Mr. R. W. Weeks to the stand.

Examination by counsel for defence, Peschau.

Q. Mr. Weeks, were you present at the preliminary examination at Southport?

(Objected to by district attorney, on the ground that the evidence had been taken down in writing.)

(Later D. A. said he would not encumber the records any more than necessary, and withdrew objection.)

Q. Did you hear the statement?

A. I heard some of it.

Q. Do you recall that he (Scott) said Adams had shot at the engineer?

A. Don't know that I can.

Q. What did he state in reference to Adams, in his examination at Southport?

A. I can't recall it all.

Q. Can you recall statements made by Scott in reference to the killing?

105 A. I believe I remember that Scott said Adams did not kill anyone, and did not have but little to do with it.

Q. His statement, then, was that Adams had nothing to do with the killing, but only had a knowledge of the general plans?

A. I believe that is right.

Cross-examined by District Attorney Skinner.

Q. The court-house was packed and crowded down there, and you could not hear very well, and you don't know exactly what was said about it?

A. No.

(Witness stood aside.)

Dr. Dozier to the stand.

Examined by Mr. Peschau, counsel for defences.

Q. Were you present at the examination of Scott at Southport?

A. I heard some of it.

Q. Do you recall what he said in reference to Adams—so far as his having taken part in the killing?

A. I think he said that boy, Adams, had nothing to do with the killing, and had very little to do with it anyway.

Cross-examined by Mr. Skinner, district attorney.

Q. How close were you to the witness when he was examined?

A. In a few feet.

Q. You don't pretend to say that you could recall what has been testified to here, do you?

A. No, sir. I could not recall it all, as I have heard so many statements.

(Witness stood aside.)

(Mr. Peschau announced that the defence would rest.)

Captain J. W. TAYLOR, a United States witness, recalled by the United States attorney, on part of the Government, and testifies as follows:

Captain TAYLOR to the stand.

Examined by Mr. SKINNER, D. A.

Q. Did you hear Scott's testimony before the commissioner's court at Southport?

A. Yes.

Q. Did you hear him here Saturday?

A. Yes.

106 Q. State in substance if his testimony delivered here was the same as that delivered before the commissioner.

A. Pretty near the same, I think.

Q. State what you can recall about Adams.

A. He said Adams was mixed up in the affair, but not so much as the rest of them. Said he knew all about it, and helped to plan the thing, but did not have as much to do as the rest.

Q. Did he say that Adams planned to shoot anybody?

A. No, sir.

Q. You heard the testimony of Adams this morning, and you heard his testimony before the commissioner. Will you please point out to the jury the differences between his statement here to-day and that before the commissioner.

(Objection noted by counsel for defence.)

A. I can not give it word for word, but I can give the substance.

Q. What did Adams testify before the commissioner in reference to the killing having taken place before breakfast?

A. He testified that the killing began about 5 o'clock, or a little after the shooting began, and was finished about 8 o'clock, or a little after. He first told aboard my vessel that the engineer was the first man killed, and that Scott went into the cabin and brought him out. Scott was walking on top of the main cabin, and stood by for half an hour, and was apparently trying to make the engineer go overboard.

Q. What did he tell before the commissioner?

A. I think he told before the commissioner that the engineer was the first man killed. That finally Scott shot him twice and threw him over the side, and the engineer called out as the ship went away. Then, about half an hour later, he went down in the cabin and brought the mate out and stood on the starboard side, and they had quite a wrestle, which lasted half an hour, and would be apart now and then. He said Scott had a revolver in his hand, and that finally they got over towards the rail,

and that Sawyer started over, and the mate saw him and said, "For God's sake, Sawyer, come and help me!" and Scott turned around and
107 said: "You keep away from here!" and that was the time he shot at Sawyer. Finally Sawyer went back forward, and that him and Adams sat on the engine room watching the shooting going on, and then he threw Mr. Hall overboard. Then Scott came around and told them to keep away from him, as some of them would get shot. He went forward and said he had to get clear of that bastard of a cook. He went to the galley and fired two shots under the deck, and then came out and went forward, and came back with a piece of rope yarn, unraveling it, and then went forward again and came back, and then said I am going to get clear of that s—— b——, and went forward and fired three shots, apparently under the deck.

Q. What did Adams and Sawyer testify about sinking or firing the ship?

A. The first plan was that the whites were supposed to have gone in the big boat and the coloreds in the small boat. They were going to put a keg of water into the boat, and fill her with water and throw some oars overboard and let her go, and then they were going to pour oil on the ship and set fire to her. Then the next plan was that they were supposed to have gone off from the vessel in the big boat, and make it believed that the whites all got *frowned* and that the four colored men swam back to the vessel.

Q. Do you recall what Adams and Sawyer said when you hailed them?

A. As I came up on the port side of the vessel, she was headed in about the same direction that we were; I hailed and asked what was the trouble. They said, one man aboard has killed the captain, mate, engineer, cook, and one sailor. Then I said, What do you want, and they said, we want to be taken off. I did not understand what they said when I asked them the name of their vessel. I said, all right, get ready. I had to stand clear, so as to put my big boat down.

Q. Did Sawyer make any such exclamations to you as he made here to-day?

A. No.

Cross-examination by defence, Mr. PESCHAU:

Q. Have you talked to me about this case?

A. Mighty little.

108 Q. Have you not made the statement to me that you did believe the defendants were absolutely not guilty?

A. No, sir.

Q. You say that the testimony as given here is different from the testimony given in Southport?

A. Somewhat.

Q. Please tell me, what was the testimony given by Sawyer in this court?

A. I can't give it to you fully.

Q. And still you can give it as taken in Southport?

A. No, not in detail.

Q. Are you prepared to say that Sawyer told half as much in Southport as he did here?

A. No; can't say.
Q. How long did the examination at Southport take?
A. From about 2.30 to about 5.30 in the evening.
Q. How many witnesses were there?
A. Myself, my mate, and my three seamen.
Q. How long were you on the stand?
A. About five or six minutes.
Q. And the mate?
A. About the same time.
Q. And the seamen?
A. About the same.
Q. Then the rest of the time was taken in the testimony of these men?
A. You got up and talked 20 minutes.
Q. Then all of the time was not taken up in the examination?
A. No.
Q. You want this jury to believe that, not being able to give the testimony as rendered here to-day, you can testify as to the testimony given in Southport?
A. I remember the substance.
(You can stand aside.)

109 The district attorney then proposed to offer as evidence the log books, and said he wanted to offer same for the purpose of contradicting Sawyer, and for the purpose of showing that the man had been logged for insolence.

(Evidence objected to by counsel for defence.)

District attorney claimed that he had a right to introduce the evidence for the purpose of contradicting the witness, but the defence claimed that the log was an ex parte statement and could be used as prima facie evidence only in cases of desertion. The district attorney maintained that the captain of a vessel was compelled to log everything connected with mutinous conduct of seamen.

Counsel were interrupted by the court, who called attention to the fact that the hour of closing had arrived, and as the attorneys at that time did not appear to be thoroughly prepared to argue the question, on which he wished to be thoroughly informed, he would give them until morning to prepare themselves as to the competency of the log book being introduced as evidence in capital cases.

(Court was then recessed for the day.)

At all stages of the proceedings the defendants were present and in court, and represented by their attorney.

And afterwards at the said session of the said court, to wit, on Tuesday, the seventh day of November, A. D. 1905, the following additional proceedings are had in said cause, to wit:

Examination of witnesses having been concluded on the previous afternoon, argument to the jury is begun, first by the assistant United States attorney on behalf of the Government, followed by George L. Peschau, attorney for the defendants, and concluded by the United States attorney, Hon. Harry Skinner, on behalf of the Government, who at one o'clock

p. m., having concluded his remarks, his honor proceeded to charge the jury, after which, at one-thirty o'clock p. m., the jury, in charge of the United States marshal, retired to their deliberations.

110 *Judge's charge.*

Gentlemen of the jury, the defendant has requested the court to put its charge in writing. I have searched the books, the Statutes and the Digest, but that the defendant may be deprived of no right, and the conduct of this case shows that the court and the officers of the Government have, as they are required to do, guarded with jealous care, from the finding of the bill of indictment to the present time, every right that the defendant could possibly have in the premises. I say that is nothing more than the duty of the officers of this court. We are dealing with a very serious question—a question of life and death. If you should say by your verdict, and the court will instruct you as to the law, that the defendant is guilty of murder, the statutes say they shall suffer death. I mean if you return an unqualified verdict, and the court is required to instruct you as to your rights as to either verdict, which I will do.

The defendant is indicted for murder on the high seas, beyond and out of the jurisdiction of any particular State, but within the admiralty and jurisdiction of the United States.

There are no exceptions to the form of the bill of indictment. The court charges you that the bill of indictment is in proper legal form, in accordance with the statutes of the United States and the decisions of the higher courts of the land construing these statutes.

If you believe from the testimony mur' or several murders have been committed on the high seas, in violation to the statutes, the killing of the master or captain, the mate, the engineer—called by some of the witnesses the chief, one of the seamen, Coakley. The killing of the latter, however, the defendants in this case are not charged with, but they are charged with the murder at sea of the first four—that is, the captain, the mate, the engineer, and the cook of the schooner "Harry A. Berwind."

111 If you believe the testimony, they were all murdered at sea, and within the jurisdiction of this court.

Murder is the killing of a human being with malice expressed or suggested.

The degrees of murder as defined and divided in the statute law, does not apply in this court.

Murder in the statutes means murder at common law, and the killing being proved, malice is presumed, and malice need not be proved, provided nothing else appears.

Now, that you may understand this more fully, gentlemen of the jury, the safest way is to go to the statutes, not what anybody has said, not what another court has decided, but the statute itself.

Section 5339, Revised Statutes, reads as follows:

"SEC. 5339. Every person who commits murder—

"First. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States;

"Second. Or upon the high seas, or in any arm of the sea, or in any

river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State;

"Third. Or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, pois'ing, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death."

That is the statute, gentlemen of the jury.

That is the only statute, except, and I call your attention particularly to this statute: January, 1897, the Congress of the United States conferred upon you, that is, the jury, if you should find these defendants guilty, after you shall first review the testimony, that is the first question for you to determine—whether under the definition, as the court gives it to you of murder, these defendants are guilty, then the statutes provide,
passed in 1897, as follows; and again I say, the fairest way is to
112 go to the statute. This is the act of January 15, 1897:

"that in all cases in which the accused is found guilty of the crime of murder under section 5339 of the Revised Statutes (the section I have read to you) or 5345 Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment to hard labor for life." (There is still another part that does not apply to a case of this kind.)

So, gentlemen of the jury, construing that statute, the Supreme Court of the United States have said that it is a privilege conferred upon you with which the court has no right to interfere; and here is what the Supreme Court says. This is from the 172 United States Opinion in the case of Winston vs. The United States: construing this statute,

"The right to qualify a verdict of guilty, by adding the words 'without capital punishment' is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right, but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court or the jury is of opinion that there are palliating or mitigating circumstances, But it extends to every case in which, upon a review of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone."

That is what the Supreme Court says and that is what the
113 court charges you here.

So you are to consider, first, gentlemen of the jury, the guilt of the defendants. After you decide they are guilty of murder you have the privilege—and you alone have that privilege—of adding to your

verdict "without capital punishment." If you should say by your verdict that the defendants are guilty of murder, as charged in the bill of indictment, then it will be the duty of the court to impose the death sentence. If you say guilty of murder without capital punishment, then it will be the duty of the court to sentence the defendants to hard labor for life. The privilege is yours, with which the court can not interfere.

I call your attention specially to that statute because it is my duty to do so.

You are to consider this case as to the guilt or innocence of Sawyer and Adams alone; the part they took in it—the part they took in this murder. If you believe the testimony—and you, gentlemen of the jury, are the sole judges of the fact—the court can not assist you in that matter; you are the sole judges of the weights to be given to the testimony and as to what should be considered and what to be rejected—whether all the testimony of the witnesses shall be rejected, or a part rejected or a part believed. In short, the object of your inquiry should be the truth, and in this the court can only assist you by telling you of some of the rules of evidence, or some of them applicable to this case.

The defendants has asked the court to give you certain special instructions along this line, and all of which the court gives you.

The law presumes that persons charged with crime are innocent (I am reading now from the prayers of the defendant') till they are proved by competent witnesses to be guilty. For the benefit of this trial the defendants are entitled, and this presumption stands as a sufficient protection, unless it has been removed by evidence proving their guilt beyond a reasonable doubt.

Second. By a reasonable doubt is not meant any mere whim or
114 suspicion on your part that the defendant' may be guilty, but you must be satisfied by the evidence of the truth.

Third. In considering the evidence, while you may take into consideration the fact that they are on trial, and that therefore they are innocent, if you believe they are, you should acquit them. The court also charges you to take into consideration the fact that the witness, Scott, is to be tried for all or a part of the crimes charged against the defendant, and you may consider this with a view to giving such weight and credit to his testimony as you see fit.

The jury may also consider, for the purpose of determining the weight to be given to the evidence of the witness, Scott, that there is evidence of the fact that the witness, Scott, has made contrary statements prior to his evidence as given in this court. However, it is for the jury to determine and be satisfied that such contradictory statements have in truth been made.

That is the rule applicable, gentlemen of the jury, to all of the evidence without exception.

You will consider all the surrounding circumstances; as I told you before, you are the sole judges of the facts.

It is for you to determine what witnesses should be believed and what witnesses should not be believed. The jury may also take into consideration the weight or credit to be given to the witness, Scott, the fact that no indictment had been sent to the grand jury against the witness,

Scott, at the time of the examination as a witness for the prosecution; and the jury are to determine, regardless of the fact that no inducements have been held out to the witness by the Government, whether or not the witness, Scott, as giving his testimony, was influenced by any hope of leniency toward himself arising from any such course on the part of the Government.

The court gives you that instruction, gentlemen of the jury, and asks that you may take cognizance of all that has occurred during this trial. I mean concerning the trial of these defendants—anything that may have occurred in the court room in your presence; and the court further charges you that if you should find, from the evidence generally,
115 or from the evidence of the witness, Scott, that he is an accomplice, then the court charges you that unless you find his testimony is corroborated his evidence should be received by you with great caution and grave scrutiny; that is the law. You must scrutinize his testimony.

The supreme court of North Carolina has decided that a man may be convicted on the unsupported testimony of an accomplice; that decision, however, is not followed in this court. The rule in this court is the old rule, that the testimony of an accomplice shall be scrutinized and the jury shall consider all the surroundings, all the influences, etc., in determining the weight they should give to the testimony; the court gives you that charge. The question whether or not the witness Scott should be considered as an accomplice is a question for you to determine upon the evidence in the case—whether such evidence be in the nature of testimony or appears from the circumstances surrounding the case, and it is not necessary that the evidence shall prove this beyond a reasonable doubt.

By an accomplice is meant one who is implicated in the crime and about which he testifies; that is, he aided and abetted in the commission of the crime, or was connected with it in any way. The test in general is to determine whether the witness is or is not an accomplice; could the witness himself have been indicted for the offence, either as principal or accessory? If he could not be indicted, he is not an accomplice; if he could, he is an accomplice.

The court further charges you that if you find that the witness Scott has falsely sworn to any material fact, then, if you think proper, you may discard his evidence in full; and the same rule applies to the testimony of all the other witnesses.

The court repeats, you are the sole judges of the facts, and the weight to be given to the testimony, or a part thereof, of any witness—considering all the surrounding circumstances.

The Government asks me to charge that the unsupported evidence of an accomplice; that if it produces the evidence of guilt it is valueless. An accomplice is a competent witness against his associates who may be convicted upon his unsupported testimony.

The court gives you that charge with what it has already said
116 that the testimony of an accomplice is to be scrutinized and weighed carefully. The circumstances and evidence must be much as to produce moral certainty of guilt, and to leave out all other, or sifted to a reasonable certainty.

The court gives you these charges, and now gentlemen of the jury,

you have heard the testimony, the facts discussed by counsel. You have heard the testimony as it fell from the lips of the witnesses; the court does not propose to repeat or attempt to repeat the testimony. If I did so I would have to tell you that you must rely on your own memory of the witness' testimony and of his deportment on the stand. In other words, I repeat again, that you are the sole judges of the facts; that the court can assist you only in telling you what the law is, which the court has attempted to do, that you must find the verdict.

If the testimony convinces you beyond a reasonable doubt that the defendants are guilty of murder, you will say so. You have the privilege of adding thereto "without capital punishment." If you are not so satisfied, if you have a reasonable doubt, and, as the court has read to you from the charges asked by the defendant, a reasonable doubt does not mean a mere whim, but it means just what the word implies—a reasonable doubt; then the defendant is entitled to the benefit of that doubt and you will say, not guilty.

There is one phase of this case, gentlemen of the jury, that I have not charged you fully as to, but I will rest on the prayer asked by the Government and add, as to the conspiracy, if you are satisfied there was an agreement—a conspiracy to murder the officers of this ship, another act done in pursuance of that agreement—that makes all the conspirators guilty. What I mean by that (and it is not in the written charge) where two men agree in a conspiracy, that is they agree to do a certain thing, they agree to bind together to accomplish a certain purpose, and one of the conspirators does the act agreed on, why then the others are guilty. That was decided, I believe, and I have no doubt about its being law, but even as to that, you must be satisfied beyond a reasonable doubt that there was a conspiracy and that the act was done pursuant to that
117 conspiracy; you must be satisfied beyond a reasonable doubt at that.

Gentlemen, are there any exceptions?

Mr. PESCHAU. Yes, sir.

Gentlemen, you may take the case.

And afterwards at the said session of said court, to wit, on the same day (November 7th, 1905), at four o'clock p. m., the jury come into court, and through their foreman, F. M. Moore, render a verdict of guilty of murder as charged in the bill of indictment.

Whereupon it is ordered that the jury be polled, when each juror for himself answered "Guilty."

*Motion in arrest of judgment.*

Motion by George L. Peschau, attorney for defendants, for arrest of judgment and order for new trial.

Motion denied. Exception allowed.

Afterwards at the said session of the said court, to wit, on Wednesday, the eighth day of November, A. D. 1905, the following additional proceedings are had in said cause, to wit:

It is ordered by the court that defendants' attorney be allowed thirty days in which to file bill of exceptions.

Afterwards at the said session of the said court, to wit, on Friday, the tenth day of November, A. D. 1905, the following additional proceedings are had in said cause, to wit:

It is ordered that the defendants, Robert Sawyer and Arthur Adams, be brought into court.

Pursuant to the above order of court, the defendants, Robert Sawyer and Arthur Adams, are now in court and represented by their attorney, George L. Peschau, who makes motion for new trial.

118 Motion overruled and denied.

Defendant's attorney makes motion for arrest of judgment.

Motion overruled.

Whereupon the defendants, Robert Sawyer and Arthur Adams, are told to stand up, and are each asked by the court, why judgment should not be passed upon you?

They replied, "Because I am not guilty."

Judgment of the court: Is that you, Robert Sawyer and Arthur Adams, be taken back to the jail from whence you came, and there be held until the twenty-sixth day of January, A. D. 1906, when in accordance with the verdict of the jury and the judgment of this court, you and each of you are to be hanged by the neck until you are dead. And may God have mercy on your soul.

Motion by attorney for the defendants, that they be allowed thirty days in which to file "writ of errors," and appeal to be made in forma pauperas.

*Bill of exceptions.*

(Filed December 4th, 1905.)

Circuit Court of the United States for the Eastern District of North Carolina, sitting in the City of Wilmington.

UNITED STATES
*vs.*
ARTHUR ADAMS & ROBERT SAWYER. } Bill of exceptions.

Be it remembered that at a term held in November, A. D. 1905, in the city of Wilmington, State of North Carolina, the Honorable Thomas R. Purnell, judge of said court, presiding, the defendants, Arthur Adams and Robert Sawyer, being indicted and arraigned for murder, on

119 the high seas, on an American vessel, to wit, the schooner "Harry A. Berwind," without the jurisdiction of any State, but within the jurisdiction of the said Circuit Court of the United States, the above-entitled case coming on to be tried, the following proceedings were had:

I.

While the jury was being empanelled several jurors were called and were told by the district attorney to stand at the foot of the panel without any challenge on the part of the Government and without an opportunity given to defendants to accept, challenge for favor or cause, or to peremptorily challenge, any or all of said jurors so stood aside.

To each and every action in this respect on the part of the Government the defendants promptly and in due time objected, but the court overruled the objection, to which ruling of the court, the defendants, by their counsel, then and there excepted.

II.

That after the jury was empanelled the defendants challenged the array, assigning as ground of challenge that the special venire of fifty summoned in the case, of which were on the jury as empanelled, to wit, M. M. Caddell, R. I. Durham, and H. W. Hood, were improperly summoned, the summons having been made on them by telephone or by telegram. The admission as to the method of summoning them being made in open court by the United States marshall. But the court overruled said challenge, and to this ruling of the court the defendants, by their counsel, then and there duly excepted.

III.

That the district attorney in his argument to the jury made the statement that he did not believe that the defendants upon their examination on their own behalf had told the truth. To which remark the defendants at the time and through their counsel objected upon the ground that the district attorney was not a sworn witness and had no right to testify or to express his belief. The court overruled the objection, and stated in the presence of the jury that the argument so made by counsel for the United States was not improper, to which ruling and remark of the court the defendants by their counsel then and there excepted.

120 IV.

On the argument of the case to the jury the district attorney, in referring to the statement made by the defendant Sawyer in his examination that after the mate had been killed he was ordered by the witness Scott to make coffee and drank a little himself, said: "A man under such circumstances who would drink coffee ought to be hung on general principles."

To which remarks the defendants through their counsel at the time objected, on the ground that the remarks were improper and made solely for the purpose of causing prejudice against defendants. And before hearing defendants' counsel on the objection the court remarked: "Mr. Peschau, do you want to cut the district attorney out of making his speech?" After which the court asked the district attorney to confine himself to a proper argument and the district attorney expressed his regret if he had made an improper argument. To both remarks of the district attorney and the comments of the court as made to counsel for the defendants the defendants then and there duly objected, and immediately asked to be allowed to file an exception. And upon this request to file an exception and for the court to embody his words to counsel in the exception, the court replied: "I will give counsel on the records the benefit of a statement that he has made an exception which the court considers frivolous, but has already admonished counsel to confine him-

self to a proper argument, but the court will not put down in writing the words or comments as used to counsel for the defendants." To which remarks counsel for defendants excepted.

V.

That the court upon its own motion in the charge gave to the jury the following instructions, to wit: "If you believe, from the testimony, murder or several murders have been committed on the high seas in violation of the statutes, the killing of the captain or the master, the mate, the engineer, called by some of the witnesses the chief, one of the seaman, Coakley—the killing of the latter, however, the defendants in this case are not charged with, and if so charged, there is no evi-
121 dence to support such charge—but they are charged with the murder at sea of the first four; that is, the captain, the mate, the engineer, and the cook of the schooner "Harry A. Berwind." To which charge and remarks the defendants objected upon the grounds that the bill of indictment expressly charged the defendants with the murder of John S. Coakley and said charge had not been withdrawn, and the charge and remarks of the court tended to unduly prejudice the defendants, because it nullified the admissions of Scott that he had killed Coakley, which objection was overruled, and the defendants excepted.

VI.

In that the court, although requested by counsel of the defendants at the close of the testimony to put the charge in writing, which was done, proceeded to charge on the law of conspiracy outside of and in addition to the written charge, the court using the following language: "There is one phase of this case, gentlemen of the jury, that I have not charged you fully as to, but I will rest on the prayer asked by the Government and add, as to the conspiracy, if you are satisfied there was an agreement—a conspiracy to murder the officers of this ship, and act done in pursuance of that agreement, makes all the conspirators guilty. What I mean by that (and it is not in the written charge), where two men enter into a conspiracy—that is, they agree to do a certain thing, they agree to combine together to accomplish a certain purpose, and one of the conspirators does the act agreed on—then the others are guilty. That was decided, and I have no doubt about its being law, but even as to that you must be satisfied beyond a reasonable doubt that there was a conspiracy and that the act was done pursuant to that conspiracy—you must be satisfied beyond a reasonable doubt at that." To which the defendants before the jury had retired entered an exception, because the remarks were not in the written charge. The court overruled the objection and the defendants excepted.

VII.

On the trial of this cause the defendant Arthur Adams was called as a witness in his own behalf, and took he stand and testified
122 only to such facts as related to the voyage of the schooner "Harry A. Berwind," and to the tragedy for which he and his codefendant

were on trial. That upon cross-examination the district attorney asked Adams questions with reference to his service upon other vessels, including the schooner "Benefit," and among others the following:

Q. "I will ask within the latter part of the fifteen months you were on the schooner 'Benefit,' you did not have trouble and tried to create insubordination?" To which question the defendant, by his counsel, then and there objected upon the ground that a defendant in a criminal case who had taken the stand and testified in his own behalf could only be cross-examined upon the circumstances about which he had testified in chief, or upon matters which tended to impeach his character for veracity, and could not be compelled to testify as to other crimes. The objection was overruled and the defendants duly excepted to such ruling. The district attorney then proceeded to ask:

Q. "State what trouble you had on the 'Benefit.'" A. "I was never logged. The only trouble was that the cook gave us molas'es to make tea, and I said that was not right, and myself and three other men went to the captain and asked him if he thought it was right. He said that they did not have much sugar and we would have to use molas'es; and then I took the tea and threw it overboard and went forward."

Q. "Did you not from that time on during that voyage have continuous trouble aboard the 'Benefit'—and even after the captain had explained to you, you went and threw your tea overboard and then went back and tried to create mutiny?"

A. "No, sir. When I was told the second time there was no sugar and we had to use molas'es, I said nothing more."

Q. "Did you not go back among the crew and try to create dissatisfaction?" A. "No, sir."

Q. "Did you not go and demand you wack?" A. "After we got out to sea, there were some complaints about our food."

Q. "Did the captain not threaten to put you in irons?"

A. "No, sir."

To all of which questions and answers the defendant in due
123 time objected. The objections were overruled, and defendant Adams, through his counsel, duly excepted.

## VIII.

Whereupon the plaintiff presents this bill of exception and assigns the foregoing causes as error, and prays the same may be signed and sealed by the court and made a part of the record in this cause. And it is signed and sealed accordingly. Being away from my chamber at Raleigh, N. C., in attendance as one of the judges of the U. S. Circuit Court of Appeals at Richmond, Va., the foregoing bill of exceptions is allowed, signed, and sealed and approved, except in so far as the same may vary from the record in the case.

THOS. R. PURNELL,
*U. S. Judge, &c.*

Dec. 2, 1905.

*Petition for extension of time for preparing bill of exceptions.*

(Filed December 8th, 1905.)

Circuit Court of the United States for the Eastern District of North Carolina, sitting in the city of Wilmington.

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| UNITED STATES vs. ARTHUR ADAMS & ROBERT SAWYER. | Petition for extension of time for preparing bill of exceptions. |

Now comes your petitioners, Arthur Adams and Robert Sawyer, and respectfully shows to this honorable court that they were unable to retain counsel for the preparation and argument in their appeal in this cause until within the last few days, and respectfully petitions this honor-
124 able court to extend the time for the preparation, signing, and sealing of the bill of exceptions for fifteen days, and your petitioners will ever pray.

ARTHUR ADAMS.
ROBERT SAWYER.
By GEO. L. PESCHAU,
*Attorney.*

The foregoing petition is granted, and it is ordered that the time be extended fifteen days as prayed for.

THOS. R. PURNELL,
*U. S. Judge, &c.*

*Bill of exceptions.*

(Filed December 21st, 1905.)

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| UNITED STATES vs. ARTHUR ADAMS AND ROBERT SAWYER. | United States of America. Circuit Court of the United States for the Eastern District of North Carolina, sitting at Wilmington. |

Before Circuit Judge Thomas R. Purnell.

Be it remembered that the schooner "Harry A. Berwind" sailed from Philadelphia on the 6th day of July, A. D. 1905, bound for Cardenas, Cuba. Her destination was first to Cardenas, thence to Mobile, Ala.; thence to Philadelphia. She had on board upon leaving Philadelphia, outward bound, a captain, E. R. Rummill; John Hall, mate; C. L. Smith, engineer; John Falbe, cook, and four seamen—Henry Scott, Arthur Adams, the defendant; Robert Sawyer, the defendant, and one John S. Coakley. The schooner left Cardenas with all aboard, and arrived at Mobile. She left Mobile with all aboard September 23rd, 1905, for Philadelphia, with a load of lumber under and on deck.

The vessel proceeded on her course after leaving Mobile,
125 toward her port of destination. On October 6th, in a squall, the topsail was lost, and on October 8th the vessel ran into a gale and carried away her rudder post. In this gale she sprung a leak and her pumps were thereafter kept continuously going.

On the night of October 10th, about 9 o'clock in the evening, the look-out on the American schooner "Blanche H. King," reported a vessel ahead right in her course, carrying a red light in the upper rigging, and at times bearing across the course of the "Blanche H. King." The captain of the "Blanche H. King" hailed the vessel, which proved to be the American schooner "Harry A. Berwind." As the "Blanche H. King" drew nearer the other vessel, Captain Taylor of the "King" hailed and asked what was the matter, and the reply came back from the "Berwind" that a man aboard had killed the captain, mate, engineer, steward, and had just killed a sailor. The capt. of the "King" then asked what was wanted, to which the voice replied they wanted to be taken off. A boat from the "King" was sent alongside, and after some parleying Adams, the defendant, Sawyer, the defendant, and one Henry Scott were found to be all that were alive aboard, and were taken into the boat and carried to the "Blanche H. King." Scott was found aboard the "Harry A. Berwind," tied on the cabin house, and he was pointed out by Adams, the defendant, and Sawyer, the defendant, as the person who killed the captain, mate, engineer, and the seamen still aboard. The three men, Scott, Adams, the defendant, and Sawyer, the defendant, were then taken aboard the "Blanche H. King" and put in irons, and put down in the lazarette.

The "Harry A. Berwind" was placed in the hands of a prize crew, and both vessels were brought into Southport, North Carolina. The body of the dead sailor, Coakley, was still aboard when the "Berwind" reached Southport. Nothing was seen of either the captain, the mate, the engineer, and the cook of the "Harry A. Berwind" at the time she was boarded by members of the crew of the "Blanche H. King" or afterwards.

At Southport the three men were given a preliminary hearing before two United States commissioners sitting together, and Adams, the defendant, and Sawyer, the defendant, and Henry Scott voluntarily made statements, being examined before the commissioners in the
126 order given above. Adams, the defendant, and Sawyer, the defendant, stoutly maintained their innocence of any connection whatever with the outrage, and placed the entire responsibility upon Scott. Scott took the stand, and made, what was afterward referred to by him in his examination as a Government witness, as a "small statement." In this statement he implicated Adams & Sawyer, all who were found aboard the "Harry A. Berwind." Cross-examined while testifying as a Government witness in the case in the Circuit Court against the two defendants, he adverted to a part of the statement made before the commissioners at Southport.

"See testimony of Henry Scott," pages 21 & 31.

Dr. Dozier (the expert who made the post-mortem examination of Coakley, the dead sailor, and who was summoned for the Government, but not called, was called in the trial in the Circuit Court against Adams and Sawyer as a witness for defendants regarding a statement of Scott before the commissioners, and being sworn he testified:

Q. Were you present at the examination of Scott in Southport?

A. I heard some of it.

Q. Do you recall what he said in reference to Adams—so far as his having taken part in the killing?

A. I think he said that boy Adams had nothing to do with the killing, and very little to do with it anyway.

Cross-examined by U. S. attorney:

Q. How close were you to the witness when he was examined?

A. In a few feet.

Q. You don't pretend to say that you could recall what has been testified to here, do you?

A. No, sir; I could not recall it all, as I have heard so many statements.

R. W. Weeks (the coroner who held the inquest over Coakley) was called as a witness for the defense in reference to the statements of Scott at the preliminary investigation before the commissioners at Southport, and testify in the Circuit Court in the case against the two defendants as follows:

Q. Mr. Weeks, were you present at the preliminary investi-
127 gation at Southport? Did you hear the statement?

A. I heard some of it.

Q. Do you recall what Scott said—that Adams shot the engineer?

A. Don't know that I can.

Q. Do you recall statements made by Scott in reference to the killing?

A. I believe I remember that Scott said Adams did not kill anyone, and did not have but little to do with it.

Q. His statement, then, was that Adams had nothing to do with the killing, but had only a knowledge of the general plans?

A. I believe that is right.

Cross-examined by U. S. attorney:

Q. The courthouse was packed and crowded down there, and you could not hear very well, and you don't exactly know what was said about it?

A. No.

Captain Taylor, a witness for the Government, said in reference to the proceedings before the commissioners: "The testimony of Scott was 'pretty near the same, I think.' He said Adams was mixed up in the affair, but not so much as the rest of them. Said he knew all about it and helped to plan the thing, but did not have so much to do as the rest."

Q. (By U. S. attorney.) Did he say that Adams planned to shoot any body?

A. No, sir.

All three of the prisoners were bound over by the commissioners to the District Court for the Eastern District of North Carolina to await the actions of the grand jury, and were sent to jail at Southport, from whence they were conveyed to the county jail at Wilmington.

In the District Court for the Eastern District of North Carolina, upon
motion of United States Attorney Skinner, on November 1st,
128 after indictment found the case was transferred to the Circuit Court for the Eastern District of North Carolina.

Bills of indictment were returned against Adams and Sawyer jointly for the murders of E. R. Rummill, master; John Hall, mate; C. L. Smith, engineer; John Falbe, cook, and John S. Coakley, seaman. No indictment against Henry Scott was returned against the said Scott until November 4th, when the jury empannelled in the case of Adams and Sawyer being out, a bill of indictment was returned against Henry Scott, and no proceedings on the indictment were had in the presence of the jury empannelled to try Adams & Sawyer.

At the United States District Court begun and held at Wilmington, in the Eastern District of North Carolina, on the 30th day of October, 1905, to wit: On the 1st day of November, 1905, the grand jury returned an indictment against Arthur Adams and Robert Sawyer for the murders of E. R. Rummill, John Hall, C. L. Smith, John L. Falbe, and John S. Coakley on the 28th day of October, A. D. 1905, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of said court in and on board of a certain vessel of the United States of America, to wit, the schooner called the "Harry A. Berwind."

The said indictment was in the words and figures following, viz:

United States of America, Eastern District of North Carolina, Wilmington Division.

In the District Court of the United States in and for the Eastern District of North Carolina, at the fall term thereof, A. D. 1905.

The grand jurors of the United States, impannelled, sworn, and charged at the term aforesaid of the court aforesaid on their oaths present: That Robert Sawyer, Arthur Adams, on the 28th day of October, 1905, with force and arms on the high seas, and within the jurisdiction of this court, and within the admiralty and maritime jurisdiction of the United States, in and on board of an American vessel,
129 the schooner "Harry A. Berwind," belonging to a citizen or citizens of said United States, whose name or names are to the grand jurors unknown, did with a certain implement or weapon (the character and name of which were to the grand jurors unknown) then and there held in the hands of one of the defendants (but of which particular one was to the grand jurors unknown) then and there piratically, wilfully, feloniously, and with malice aforethought did shoot, strike, and beat the said E. R. Rummill, captain; John T. Hall, mate; John Falbe, cook; C. L. Smith, engineer; John S. Coakley, seaman; then and there giving to the said E. R. Rummill, John T. Hall, John Falbe, C. L. Smith, John S. Coakley several serious, dangerous, and mortal wounds, and then and there, to wit, at the time and place last above mentioned, him, the E. R. Rummill, John T. Hall, John Falbe, C. L. Smith, John S. Coakley, cast and throw from and out of said vessel into the sea, and plunge, sink, and drown him, the said E. R. Rummill, John T. Hall, John Falbe, C. L. Smith, John S. Coakley, in the sea aforesaid, of which mortal wounds, casting and throwing and plunging, sinking, and drowning the said E. R. Rummill, John T. Hall, John Falbe, C. L. Smith, John S. Coakley in the sea as aforesaid they can not describe the said mortal wounds or the

character and nature of the said weapon or instruments. And so the grand jurors upon their oaths aforesaid do say that the said E. R. Rummill, John T. Hall, John Falbe, C. L. Smith, John S. Coakley at the time and place aforesaid, out of the jurisdiction of any particular State of the United States of America, in and upon the American vessel within the jurisdiction of the said United States of America and of this court, in the manner and form aforesaid, piratically, wilfully, and feloniously, and with malice aforethought did kill and murder, against the peace and dignity of the United States of America, contrary to the statute in such case made and provided, and against the peace and dignity of the United States.

HARRY SKINNER,
*United States Attorney.*

A true bill:

A. F. WILLIAMS, *Foreman.*

130 The defendants were then jointly arraigned, and each pleaded that he was not guilty. The court then assigned November 4th, 1905, as the day of trial.

Then followed proceedings to impannell a jury for the trial. On the 1st of November, A. D. 1905, the court ordered that venires issue for fifty additional petit jurors to come in on Saturday a. m., November 4th, and to be drawn from the box.

In the venire so drawn many were summoned by telegram or telephone, and only a part of the special venire—to wit, 39 of the venire—appeared. The United States marshal, in open court, in the presence of the defendants, making the statement that summons had been made by telegram or telephone. The marshal made formal return of the writ.

While the jury was being empanneled several jurors were called, and as each juror appeared he was told by the district attorney to stand at the foot of the pannel, without any challenge on the part of the Government and without an opportunity given to defendants to accept, challenge for favor or cause, or to peremptorily challenge any and all of said jurors so stood aside.

To each and to every action in this respect on the part of the Government the defendants promptly and in due time objected, but the court overruled the objections, saying the State practice would be followed, and there was no U. S. statute on the subject; to which ruling of the court the defendants, by their counsel then and there duly excepted, and the exceptions were allowed. It appeared that neither the Government nor the defense had ex'austed all their peremptory challenges when the jury was empannelled.

*Challenge to the array.*

After the jury was empannelled the defendants challenged the array, assigning as grounds for challenge that the special venire of fifty summoned in the case, of which there had been accepted by defendants and were on the jury as empannelled, to wit, M. N. Caddell, R. I. Durham, and H. W. Hood, had been and were improperly summoned, the summons having been made on them by telegram or telephone, the admission as the method of summoning them being made in open court by the United States marshal, but there was no evidence as to how

131 the three persons aforesaid were summoned, except as appeared in the writ. But the court overruled the said challenge, and to this ruling of the court the defendants, by their counsel, then and there excepted, and the exception was allowed.

The only witness introduced by the Government testifying as to the killing was Henry Scott (see page Nos. 21 & 31) and his examination was confined to such matters as were said to have taken place during the voyage of the "Harry A. Berwind" from Philadelphia to Cardenas, thence to Mobile, and thence on the return trip to Philadelphia. Scott admitted the killing of John S. Coakley, claiming he did it in self-defense, and placed upon Adams, the defendant; Sawyer, the defendant, and Coakley, the dead seaman, the entire responsibility for all the murders, the witness stating that he (Scott) had no part in any plans or was not in any way concerned in them.

The scope of the direct examination of Arthur Adams, the defendant, called for the defense, at his own request, being sworn, was as follows:

Counsel for defense Peschau recited to Adams the charges which had been brought against him of murder and mutinous conduct aboard the American schooner "Harry A. Berwind," while on a voyage from Mobile to Philadelphia, and instructed Adams to tell the court and jury fully, from beginning to end, just what trouble was had aboard the schooner.

A. I joined the schooner "Harry A. Berwind" on the 6th day of July, 1905, and on the way going to Cardenas the first trouble was when Henry Scott was at the wheel. Scott struck one bell to be relieved, but left the wheel before another man could reach him—left the wheel and came forward—asked the captain to hold the wheel—and captain told him to strike one bell. After Scott came back to the wheel, Cokeley who had gone to relieve him, came forward and said, "Henry Scott struck the captain." The next trouble was when Sawyer went to get some water, and had some words with the cook. Don't know what was said—I saw Sawyer put the bucket down and then take it up
132 again and go on. I heard Sawyer say, if the cook won't give me my water, I want my wack. The captain said, all right John, go forward; you will get whatever is your due.

Q. What took place while in Cardenas?

A. Everything was all right in Cardenas.

Q. After leaving Cardenas?

A. On leaving Cardenas for Mobile we all had to go in the rigging to set sails; Scott had the easy mast, and got ready first, and sung out to hist away, and the captain called to him to help hist, and Scott said, I won't do it; what you got a steam donkey for; the captain asked him who he was giving orders to. Later I saw Sawyer and Cokeley talking to the captain, could not hear all that was said, but did hear the captain say that those three men (referring to Sawyer, Cokeley and myself) are as good men as ever put to sea.

We got to the bar at Mobile Saturday, and Sunday the tug took us in to the quarantine station; I was sick with malarial fever; two days before reaching Mobile, and one day after—three days. We got up to Mobile at 12 o'clock Monday night, and the next day, Tuesday, went alongside the dock; while in port Henry Scott went ashore to sleep every

night; Sawyer also went ashore frequently; I was sick, and did not go ashore until Saturday night; when I went off with Scott; Henry Scott did not come aboard until 12 o'clock, the day of leaving, and the vessel was delayed two hours waiting on him; the tug was alongside; I heard the captain say; if I could get another man, I would not keep him a second.

Q. When did you leave Mobile?

A. The 23rd day of September.

Q. What trouble first took place after leaving Mobile for Phila.?

A. We were struck by a squall and the topmost sail gave away, and got broke in two places.

Q. Was there any trouble aboard at that time?

A. No.

Q. What was the first trouble you had?

A. This killing.

Q. Now come right down, and let the court hear what you know
133 of this killing from beginning to end.

A. On the morning of October 10th, Captain Rumill, Sawyer, and myself were on the starboard watch from 12 o'clock to 4 o'clock (night). Sawyer went to the wheel at 12 o'clock, but before 2 o'clock I went to relieve him. My watch was out at 4 o'clock, but as the captain did not come out and I did not know the time, it was 12 minutes past four when I struck eight bells and John Cokeley came to relieve me, and Scott went to relieve Sawyer on lookout. When I got in the forecastle I said the captain must be sleeping, as it was 12 minutes past four. Sawyer said no, the captain is not sleeping, he is in the engine room with the engineer, helping him with the pump. I listened and heard the captain and engineer talking. The vessel had sprung a leak in the squall and the pumps had to be worked night and day.

Q. This was now after 4 o'clock in the morning?

A. Yes.

Q. What then?

A. Myself and Sawyer went to bed. About 5 o'clock we had coffee, and about that time Cokeley ran to the forecastle door and sung out, "Boys, are you sleeping, get up, they are shooting aft; I don't know whether it is the captain or Scott shooting."

Q. Were you asleep?

A. I was sleep, but he woke us up.

I was so frightened I sat on the side of my bunk. I heard Coakley say he did not know who was shooting, whether it was the captain or Scott. We stood in the forecastle door about three minutes, when Scott came forward and ordered Coakley to go back to the wheel, and he said, "You fellows stay in the forecastle; I mean to shoot every damn man aboard," and he staid in the forecastle. He went aft again and we heard more shooting, and Sawyer went out, and I peeped through the door. Heard Sawyer yell out, "O Lord, don't shoot me," and run back to the forecastle. A little later Henry Scott came back and said, Sawyer, you and Adams come out and screw up the main and spanker
134 topsails. He said, I don't want you fellows to *to* have nothing to do with this. When the white folks ask about it I will tell them I did it. You fellows do as I tell you. I said all right. When we went on deck there was not a soul to be seen, except Cokeley, who was at the wheel. Scott had disappeared below.

Q. Did you have a gun?
A. No, sir; never owned a gun in my life.
Q. Well, go ahead.
A. When we finished with the sails, Scott came back and said, now you fellows go forward and do as I tell you, and when we get into port I will tell the white men I did it. Scott had a gun hanging in his belt outside.

After going forward, I heard talking, and looked out and saw Scott walking up and down. I also saw the engineer. I did not know where he came from. The engineer was washed in blood, and Scott was on the house walking up and down with a gun pointing it at him, and the engineer was praying to God. Scott was speaking to him about half an hour. I could not hear what Scott said. They talked half an hour, while the engineer was bathed in blood. Next thing I heard a gun go off, and heard a splash in the water, and heard the engineer calling as he went astern.

Q. What time was that?
A. I should say it was about six or half past six.
Q. That was the first time you had seen the engineer that night?
A. Yes.
Q. What next?
A. After that he came forward and went out, and I saw Scott and the mate on the weather side of the galley. I said, O, look! the mate is rocking like he is wounded.
Q. Had you heard any shots?
A. Yes; heard some shots. Afterwards saw the mate rocking and begging for mercy. Scott ordered the mate to go overboard, and the mate would not go, but was fighting for his life. Then Sawyer said, I am going out there, I believe Scott's gun is empty. Sawyer started, but Scott stopped him and said get back, and Sawyer came back forward.

The mate begged Sawyer for God's sake to come and help
135 him.

Q. Why could you not have gone to the mate's assistance?
A. I was afraid to go, because Scott was armed.
Q. Go ahead.
A. When Sawyer came back forward, Scott put two shots into the mate and threw him overboard on the weather side.

A little later 8 bells were struck, and Sawyer went to the wheel and Cokeley came forward, and Scott ordered us to put some water in the boiler. Cokeley and myself put the water in.

About this time we heard some shots under the deck, in the direction of the galley. Then Scott came forward again and went off the second time, when we heard some more shots in the same direction.

Then he came forward and went off again. Then immediately he came to the rail with the steward in his hands and threw him overboard on the weather side.

Q. How did you know it was the steward?
A. Because he was a very small man.
Q. Was that the last white man aboard?
A. I don't know what became of the captain.
Q. What then took place?

A. Scott came on at 12 o'clock and said, "Boys, I want you fellows to do as I tell you. If you don't do as I tell you, I will have to kill you three fellows. "Lower the big boat, fill it with water, and let it go, and then we will take the vessel in port, and when they ask us for the white men we will say we all left the vessel in a gale and the boat swamp and we swim back to the vessel, and the white men in the other boat got drowned."

We all agreed to this, because he said he would kill us. After awhile we were talking among ourselves, and Sawyer and Cokeley say the best thing to do was to get a chance to hold Scott down and tie him. I said how can we hold him down—he has a gun and we have none.

Q. Did none of you men have guns?

A. No, sir.

Scott ordered Robert Sawyer to make supper, and after eating I went to the wheel, and they had supper. Then when I was relieved,
136 Sawyer, Scott, and Cokeley went aft towards the wheel and I went forward. Just then I heard them sing out, "We have got Scott down." I went and we took away the gun. We got a chain and tied him down. He cried, "O boys, don't do that; let me go and I will jump overboard." We were afraid to do that, as he had told us he had two guns, and we thought he would get the other big gun and shoot us. We had him sitting on the steering gear, and he asked for his quilt and overcoat. I went and got the quilt and overcoat, and searched the coat. I spread the blanket, and then Sawyer, Cokeley, and myself put him on it. He was not lying down; he was simply leaning back.

He asked us to put the overcoat on him to keep off the dew. I spread the coat around him. About that time Sawyer sung out that he saw a light, and went up in the rigging, but could not make it out. We saw another light, and Sawyer went forward and I went up in the forerigging and saw a steamboat, and came down. When I was nearly down I heard shooting, and heard Cokeley sing out, "O Lord, I am shot." When I got to him Sawyer was there and had hold of Scott; Cokeley was lying across Scott. Sawyer was trying to get the gun away from Scott, and we had to beat his hand to get the gun. I got Cokeley off of Scott. Cokeley was trying to vomit, and Sawyer said go forward and get him some salt and water, but that did not make him vomit. Sawyer told me to go forward and get a red light and signal the steamboat. I went forward, and then Sawyer came forward and said Cokeley was dead, and both of us signalled to the steamer, but she did not come to us.

Q. How did you signal to the steamer?

A. With a red light.

Q. What was done next?

A. Why pretty soon we saw another light on our lee coming up, and we kept on signalling, and the vessel came up to us. Sawyer called out to them, and they said, "What do you want." Sawyer called back and said, "For God's sake, come to our assistance; one man aboard has killed the captain, mate, engineer, and cook, and killed a sailor just now."

It was a good while before they came to us. They lowered a
137 boat and came up about ten or eleven feet to us, and the mate or some of them asked us what the names were that did the killing.

I told him Henry Scott. He then asked us if we had him tied, and we answered yes.

Q. Did they take you all off? What did they do?

A. Sawyer got aboard first, and the minute he did, they handcuffed him, and did me the same way. Henry Scott got on next, bound with a rope, and they did him the same. We were kept separated at first. Later they bound us all together and put us down the lazarette; we were there all night and all next day.

Q. Adams, did you at any time prior to this killing enter into any agreement or compact, or know of any plan on the part of any men aboard the schooner Berwind to kill these people?

A. No.

Q. Had you heard of any such plan?

A. No.

Q. Did you yourself kill any man, or assist in killing any?

A. No.

Q. I will ask you now, why it was, when this killing was taking place, that you did not go to the assistance of any of these men?

A. Because I was not armed, and the man who was doing the killing was armed.

Q. Did you, or did any of you, to your knowledge, purchase pistols while in Mobile?

A. No, sir; not to my knowledge.

Q. Did you see any pistols aboard except those Scott had?

A. No, sir.

Q. Scott testified that while in Mobile on Saturday you and Sawyer and he went ashore, and that each of you went to purchase a revolver.

A. No, sir; that is not true.

Q. He states that in Mobile you showed him a pistol—a Harrington & Richards—that you had purchased. Is that true?

A. No, sir.

Q. Did you have a pistol at any time?

138 A. No, sir; never owned a pistol.

Q. Were there any threats made by the crew, to your knowledge, of a mutiny between Philadelphia and Cardenas?

A. No, sir.

Q. Were there any between Cardenas and Mobile?

A. No, sir.

Q. Was Sawyer in command of the boat after the killing had taken place?

A. No, sir; Henry Scott was in charge. Sawyer was in charge after we had Scott bound.

This embraced the entire scope of Adams' examination, whereupon the United States attorney, Mr. Skinner, proceeded to cross-examine the witness, and asked Adams questions with reference to his service upon other vessels, including the schooner "Benefit," and among others the following:

Q. I will ask if within the latter part of the 15 months you were on the schooner "Benefit" you did not have trouble and tried to create insubordination? To which question the defendant by his counsel then and there objected, upon the ground that a defendant in a criminal case

who has taken the stand and testified in his own behalf could only be cross-examined upon the matters and circumstances about which he had testified to in chief, or upon matters which tended to impeach his character for veracity, and could not be compelled to testify as to other crimes. The objection was overruled, and the defendants duly excepted to such ruling. Exception allowed, signed, and sealed accordingly. The district attorney then proceeded to ask:

(See cross-examination of Arthur Adams, page No. 16.)

Robert Sawyer, one of the defendants, a witness at his own request, was sworn and testified.

(See examination of Robert Sawyer, on page No. 69 & 77.)

In his argument to the jury the district attorney, commenting upon the testimony of the defendant Sawyer as to his having gone to
139 get coffee, said "A man under such circumstances who would drink coffee ought to be hung on general principle."

To which remarks by the United States attorney the defendants through their counsel at the time objected, having several times interrupted the United States attorney during his argument to the jury. And before hearing defendants' counsel on the objection, the court remarked, "Mr. Peschau, do you want to cut the district attorney off from making any argument?"

After which the court asked the district attorney to confine himself to a proper argument, and the district attorney expressed his regret if he had made an improper argument, and withdrew the remarks.

To both remarks of the district attorney, and the comments of the court as made to counsel for the defendants, the defendants then and there objected and asked immediately to be allowed to file an exception. And upon this request to file an exception the court replied, "I will give counsel the benefit of his statement that he has made an exception which the court considers frivolous."

Immediately upon the close of the testimony, the defendants by their counsel filed with the court prayers for instruction, and requested the court in writing to put the charge in writing. The court then proceeded to charge the jury as follows:

Gentlemen of the jury, the defendant has requested the court to put its charge in writing. I have searched the books, the statutes and the digest, but the defendant may be deprived of no right, and the conduct of this case shows that the court and the officers of the Government have, as they are required to do, guarded with jealous care, from the finding of the bill of indictment to the present time, every right that the defendant could possibly have in the premises. I say that is nothing more than the duty of the officers of this court. We are dealing with a very serious question—a question of life and death. If you should say by your verdict, and the court will instruct you as to the law, that the defendant is guilty of murder, the statutes say they shall suffer death. I mean, if you return an unqualified verdict, and the court is required to instruct you as to your rights as to either verdict, which I will do.

140 After some general remarks the court read the following charge, put in writing at the request of defendants' counsel.

The defendants are indicted for murder on the high seas, beyond and out of the jurisdiction of any particular State, but within the admiralty

and maritime jurisdiction of the United States. There are no exceptions to the form of the bill of indictment. The court charges you the bill is in proper legal form, in accordance with the statutes of the United States and the decision of the highest courts of the land construing the same.

If you believe the testimony, a murder or several murders have been committed on the high seas in violation of the statute. The murder of the master or captain, the mate, the engineer (or chief as he is called by some of the witnesses), and one of the seamen, Oakley (with the killing of the latter, however, defendants are not charged; if charged in the bill, there is no evidence to support such charge). They are charged with the murder at sea of the first four—the captain, mate, engineer, and cook. If you believe the testimony they were all murdered at sea, within the jurisdiction of this court.

Murder is the killing of a human being with malice aforethought, express or implied. The degrees of murder, as divided and defined in the State law, do not apply. The murder meant by the statute is murder as defined at the common law. Malice need not be proved; the killing being proven, malice is presumed, nothing else appearing.

Section 5339 R. S., is thus written and inserted:

"Every person who commits murder—

"First. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States;

"Second. Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State;

"Third. Or who upon any of such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death."

141 Congress has, however, passed an act, Chap. 29, ratified January 15th, 1897, which confers on you a privilege to which it is my duty to call your attention, and your attention is called especially.

"In all cases where the accused is found guilty of the crime of murder under sections fifty-three hundred and thirty-nine, R. S., the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life."

This last act has been construed by the Supreme Court in Winston vs. United States, 172 U. S., 312, to confer on the jury, and the jury alone, the prerogative of qualifying a verdict of guilty in a capital indictment. Winston vs. United Stat*utes*, 172 U. S., 312:

"Second. The difficulty of laying down exact and satisfactory definitions of degrees in the crime of murder, applicable to all possible circumstances, has led other legislatures to prefer the more simple and flexible rule of conferring upon the jury, in every case of murder, the right of deciding whether it shall be punished by death or *by death or* by imprisonment. This method has been followed by Congress in the act of 1897.

"The act of Congress confers this right upon the jury in broad and unlimited terms by enacting that 'in all cases in which the accused is found guilty of the crime of murder,' 'the jury may qualify their verdict by adding thereto "without capital punishment,"' and that 'whenever the jury shall return a verdict qualified as aforesaid' the sentence shall be to imprisonment at hard labor for life.

"The right to qualify a verdict of guilty, by adding the words 'without capital punishment,' is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right, but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court or the jury is of opinion that there are palliating or mitigating circumstances, but it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness, or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone."

You must find defendants guilty of murder as charged, when you have the privilege of qualifying your verdict by adding "without capital punishment," when it would devolve on the court to sentence defendants to imprisonment at hard labor for life.

You are to consider this case as to the guilt of Sawyer and Adams. You are the sole judges of the facts, the weight of
142 testimony, as to what shall be considered and what to be rejected, whether all the testimony of a witness should be rejected, or a part rejected and a part believed—in short, the object of your inquiry is the truth, and in this the court can only assist you by telling you the rules of evidence, or some of them applicable.

Prayers for special instructions read and given as asked.

"The defendants ask that the charge of the court be given in writing; and they ask in addition to the above request that the following instructions be given to the jury and embodied in the charge."

I. The law presumes that persons charged with crime are innocent until they are proven by competent evidence to be guilty. To the benefit of this presumption the defendants are both entitled, and this presumption stands as their sufficient protection unless it has been removed by evidence proving their guilt beyond a reasonable doubt.

II. By a reasonable doubt, is not meant a mere whim or suspicion on your part that the defendants may be guilty, but you must be satisfied by an abiding conviction on the evidence, of the truth of the charge.

III. In considering the evidence of the defendants, while you may take into consideration the fact that they are on trial and that therefore they are considered interested, yet if you believe them you should acquit them. The court also charges you on the other hand, that you may also take into consideration the fact that the witness Scott is to be tried for

all or a part of the crimes charged against the defendants, and you may consider this with a view to giving such weight and credit to the evidence as you see fit.

IV. The jury may also consider for the purpose of determining the weight to be given to the evidence of the witness Scott, that there is evidence to the effect that the witness Scott has made contradictory statements prior to the evidence as given in this court. However, it is for the jury to determine and be satisfied that such contradictory statements or statement have in truth been made.

V. The jury may also take into consideration, in determining the weight or credit to be given to the testimony of the witness Scott,
143 the fact that no indictment had been sent to the grand jury against the witness Scott at the time of his examination as a witness for the crimes, or any of them, set out in the indictment against the defendants, and the jury are to determine (regardless of the fact that it is stated that no inducements have been held out by the Government to the witness), whether or not the witness Scott in giving his testimony was influenced by any hope or leniency towards himself, arising from such a course on the part of the Government.

VI. The court further charges you that if you should find, either from the evidence generally or from the admissions of the witness Scott, that he is an accomplice, then the court charges you that unless you find his testimony is corroborated the evidence should be received by you with great caution and carefully scrutinized.

VII. The question whether or not the witness Scott should be considered an accomplice is a question for you to determine upon the evidence or testimony *or* appears from the circumstances surrounding the case, and it is not necessary that the evidence should prove this beyond a reasonable doubt.

VIII. By an accomplice is meant a witness who is implicated in the crime about which he testifies. The test in general to determine whether a witness is or is not an accomplice is the inquiry: Could the witness himself have been indicted for the offense either as principal or as accessory? If he could not be indicted, he is not an accomplice; if he could, he is an accomplice.

IX. The court further charges you that if they find that the witness Scott has falsely sworn to any material fact, then, if they think proper, they may discard his testimony in full; and the same rule applies to the testimony of other witnesses. You are the sole judges of the facts, of the weight to be given to the testimony or part thereof of any witness.

The district attorney asks the following instructions:

I. Unsupported evidence of an accomplice, if it produce entire belief of guilt, sufficient to warrant conviction. State vs. Rowe, 98, 629.

II. An accomplice is a competent witness against his associates,
144 who may be convicted upon his unsupported testimony. State vs. Stroud, 95, 626.

III. The circumstances and evidence must be such as to produce a moral certainty of guilt and to exclude any other reasonable hypotheses. State vs. Mathews.

IV. Reasonable doubt means fully satisfied or satisfied to a reasonable certainty. State vs. Whitson, 111, 695.

The facts have been discussed fully by counsel. The court, therefore, does not repeat the testimony. You heard it as the court did; you must rely on your memory for the testimony.

The court then defined a conspiracy, giving the general definition as laid down by the Supreme Court.

At the conclusion of the charge the court asked, "Is there any exception to the charge as given? Mr. District Attorney, have you any exceptions?" to which the United States attorney responded, "none." "Mr. Peschau, have you any exceptions? If you have, they must be taken and noted before the jury leaves the box." To this counsel for defendants replied "yes," and after a few minutes handed up an exception to the effect that the court, after giving the special instructions as asked, gave to the jury the general definition of a conspiracy and an accomplice, which exception was immediately allowed, signed, and sealed. The court then said to the jury, "Gentlemen, you may retire and decide on your verdict."

Mr. PESCHAU. "I should like to file my exceptions to charge." I should, however, like to reserve a general exception simply to save my rights, as I have not been able to get the stenographer's notes.

COURT. You may.

Whereupon counsel for the defendant in due time filed the following exceptions to the charge of the court:

"The defendant excepts to the charge as given in that the court upon its own motion gave to the jury the following instructions, to wit: If you believe from the testimony murder or several murders have been committed on the high seas in violation of the statutes, the killing of the captain or master, the mate, the engineer, called by some of the witnesses the chief, one of the seamen, Oakley. The killing of the latter, however, the defendants in this case are not charged with; but they are charged with the murder at sea of the first four—that is, the captain, the mate, the engineer, and the cook of the schooner "Harry A. Berwind." Objection overruled and defendants excepted. Exception allowed.

Second. In that the court, although requested by counsel of the defendants at the close of the testimony to put the charge in writing, proceeded to charge on the law of conspiracy outside of and in addition to the written charge, the court using the following language: "There is one phase of this case, gentlemen of the jury, that I have not charged you fully as to, but I will, on the prayer asked by the Government, and add, as to the conspiracy, if you are satisfied there was an agreement—a conspiracy to murder the officers of this ship, another act done in pursuance of that agreement—that makes all the conspirators guilty. What I mean by that (and it is not in the written charge), where two men agree in a conspiracy, that is they agree to do a certain thing, they agree to bind together to accomplish a certain purpose, and one of the conspirators does the act agreed on, why then the others are guilty. That was decided, I believe, and I have no doubt about its being law, but even as to that you must be satisfied beyond a reasonable doubt that there was a conspiracy and that the act was done pursuant to that conspiracy—you must be satisfied beyond a reasonable doubt at that." To which the defendant, before the jury had retired, entered an exception, because the

remarks were not in the written charge. The court overruled the objection and the defendants excepted. Exception allowed, signed, and sealed accordingly.

The jury retired and returned a verdict of guilty as to both defendants.

After the verdict and before judgment the defendants moved in arrest of judgment. Motion overruled, exception. The defendants then moved that the verdict be set aside and a new trial granted—

1st. Because the verdict is against the evidence and the weight thereof.

146 3rd. Because of the improper method of summoning the special venire.

4th. Because of error in permitting the United States attorney to arbitrarily stand certain jurors, without challenge, to the foot of the panel, giving no opportunity to the defendants to accept such jurors.

5th. Because the prosecution was permitted to cross-examine the defendant Adams, after objection, on prejudicial matter not brought out and foreign to his direct examination.

6th. Because the court in its charge to the jury instructed the jury that the defendants were not charged with the murder of Coakley, whereas the bill of indictment expressly charged the defendants with the murder of John S. Coakley and said charge had not been withdrawn, and the charge and remarks of the court tended to unduly prejudice the defendants, because it nullified the admissions of Scott that he had killed Coakley, an offense with which the defendants were expressly charged in the bill of indictment.

7th. Because the court, although requested by counsel for the defendant to put his charge in writing, proceeded, in addition to his written charge, to orally charge the jury on the law of conspiracy and its alleged application to the case. Motion for new trial overruled.

The defendants were given on Nov. 7th, 1905, thirty days in which to file a bill of exception, the time to begin from the granting of the request and its allowance. On November 10th sentence of death was pronounced against the two defendants, and they were sentenced to be hanged on January 26th, 1906.

On December 5th, 1905, the following petition for extension of time in preparing a bill of exceptions was allowed the defendants by the court:

147 UNITED STATES *vs.* ARTHUR ADAMS AND ROBERT SAWYER. } Circuit Court of the United States for the Eastern District of North Carolina, at Wilmington, N. C.

Now come your petitioners, Arthur Adams and Robert Sawyer, and respectfully show to this honorable court that they were unable to retain counsel for the preparation and argument in their appeal in this cause until within the last few days, and respectfully petition this honorable court to extend the time for the preparation, signing and sealing of the bill of exceptions for fifteen days, and your petitioners will ever pray.

ARTHUR ADAMS.
ROBERT SAWYER.
By GEO. L. PESCHAU,
*Attorney.*

The foregoing petition is granted, and it is ordered that the time be extended fifteen days.

THOS. R. PURNELL,
*U. S. Judge, &c.*

Whereupon the plaintiffs present this bill of exceptions and pray the same may be signed and sealed by the court and made a part of the record in this cause.

ARTHUR ADAMS.
ROBERT SAWYER.
By *His Attorney.*

The foregoing bill of exceptions is allowed and ordered to be entered of record in the case.

THOS. R. PURNELL,
*Judge, U. S. Circuit Court.*

Dec. 20, 1905.

148 *Affidavit to prosecute without cost.*

(Filed December 23rd, 1905.)

United States of America.

In the Circuit Court for the Eastern District of North Carolina.

UNITED STATES, BY INDICTMENT, *vs.* ARTHUR ADAMS & ROBERT SAWYER. } Affidavit.

Arthur Adams and Robert Sawyer being duly sworn, each for himself, says, that he was tried, convicted, and sentenced for murder on the high seas at the November term of this court, and that he is advised by counsel that there is error in the proceedings had upon said trial and he is desirous of having said trial and judgment reviewed by writ of error to the Supreme Court of the United States; that his counsel have prepared a bill of exceptions and have filed a petition for a writ of error and an assignment of errors for the purpose of reviewing said sentence and judgment; and that he is utterly without means to pay the costs of prosecuting his writ of error and humbly prays this honorable court for an order that he be allowed to prosecute his writ of error without cost to him.

ROBERT SAWYER.
ARTHUR ADAMS.

Sworn to and subscribed before me this 22 day of December, 1905.

JOHN J. FURLONG,
*Notary Public, New Hanover County, N. C.*

My commission expires May 20th, 1907.

*Order that defendants be allowed to prosecute writ of error without cost.*

(Filed December 23rd, 1905.)

United States of America.

In the Circuit Court for the Eastern District of North Carolina.

149 UNITED STATES, BY INDICTMENT, *vs.* ARTHUR ADAMS & ROBERT SAWYER. } Order.

Upon reading the affidavits of the defendants in this cause, it is ordered that the clerk of this court prepare the transcript of record for the Supreme Court, and all necessary papers for the prosecution of the writ of error for each of the defendants, Adams and Sawyer, without cost to them.

THOS. R. PURNELL,
*U. S. Judge holding Circuit Court.*

150 *Citation on writ of error.*

UNITED STATES OF AMERICA, ss.

*The President of the United States to the United States of America, greeting:*

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, on the fifteenth day of January next, pursuant to writ of error filed in the clerk's office of the Circuit Court of the United States for the Eastern District of North Carolina, at Wilmington, in the Fourth Circuit, in a cause entitled United States by indictment versus Robert Sawyer and Arthur Adams, wherein the said Robert Sawyer and Arthur Adams are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Thomas R. Purnell, judge of the District Court of the United States for the Eastern District of North Carolina, holding said Circuit Court, this 21st day of December, in the year of our Lord one thousand nine hundred and five.

[SEAL.] THOS. R. PURNELL,
*United States District Judge holding the Circuit Court.*

Acknowledgment of service on back.

No. 126. Civil trial. United States Circuit Court, Eastern District of North Carolina. At Wilmington. The United States *vs.* Robert Sawyer and Arthur Adams. Citation on writ of error.

Due service of the within citation is hereby acknowledged.

HARRY SKINNER,
*United States Attorney for the Eastern District of North Carolina.*
Dec. 30, 1905.

United States courts. Office of the clerk. Filed January 2, 1906, Wilmington, N. C., at 10 a. m. Samuel P. Collier, clerk.

151 United States of America.

In the Circuit Court for the Eastern District of North Carolina.

UNITED STATES, BY INDICTMENT,
*vs.*
ARTHUR ADAMS & ROBERT SAWYER.

*Petition for writ of errors.*

*To the Clerk of the Circuit Court of the United States for the Eastern District of North Carolina sitting at Wilmington:*

Your petitioners, Arthur Adams and Robert Sawyer, the defendants in the above-entitled cause, respectively represent that at the fall term, 1905, of this court they were convicted on indictment number 126, charging them with the crime of murder upon the high seas, and that said court has pronounced judgment and sentence of death upon these petitioners on the verdict of the jury convicting them as aforesaid.

Your petitioners allege that in the record and proceedings in the trial of this cause in said court there is great and manifest errors to the prejudice and great damage of your petitioners. They therefore pray that a writ of error from the Supreme Court of the United States be issued by you under the seal of said court, in said cause, remanding the said cause and the record therein to the said Supreme Court, in order that the same may be there examined, and, if error be found, that the said judgment and sentence against them therein be reversed.

ARTHUR ADAMS.
ROBERT SAWYER.

By their counsel:
GEORGE L. PESCHAU.

152 United States of America. In the Circuit Court for the Eastern District of North Carolina.

UNITED STATES BY INDICTMENT
*vs.*
ARTHUR ADAMS & ROBERT SAWYER.

*Assignment of errors.*

Now comes Arthur Adams and Robert Sawyer, the defendants in the above-entitled cause, and files this their assignment of errors committed upon the trial of said cause, and in the matter of certain motions made by the defendants both before and subsequent to said trial, to wit:

First. The court erred in overruling defendants' motion in arrest of judgment.

Second. The court erred in permitting the United States attorney to arbitrarily stand certain jurors, without challenge, to the foot of the panel.

Third. The court erred in overruling the defendants' challenge to the array because of the improper method of summoning the special venire.

Fourth. The court erred in permitting the United States attorney to use, in his closing argument, and over the objection of defendants' counsel, improper language prejudicial to the defendants.

Fifth. The court erred in permitting the United States attorney, over the objection of defendants' counsel, to cross-examine the defendant (Adams) with reference to his alleged insubordination on the schooner "Benefit."

Sixth. The court erred in charging the jury that the defendants, Adams and Sawyer, were not charged with murder of Coakley, when the bill of indictment expressly charges them with the murder of said Coakley as well as the others, and said charge had not been withdrawn;

153 and this charge of the court tended to prejudice the defendants, because it nullified the effect of the admission of Scott that he alone had killed Coakley.

Seventh. The court erred in refusing or neglecting to put the whole charge in writing, although requested so to do, in apt time, by counsel for defendants.

ARTHUR ADAMS &
ROBERT SAWYER.

By their counsel:

GEORGE L. PESCHAU.
GEORGE ROUNTREE.

154 *Clerk's certificate.*

UNITED STATES OF AMERICA, EASTERN DISTRICT OF NORTH CAROLINA. IN THE FOURTH CIRCUIT, AT WILMINGTON, *ss:*

I, Samuel P. Collier, clerk of the Circuit Court of the United States for the Eastern District of North Carolina, at Wilmington, within the Fourth Circuit, certify that the foregoing is a true copy of the record in the cause entitled, No. 126, Trial Docket. United States by indictment versus Robert Sawyer and Arthur Adams, in said Circuit Court determined, and that annexed hereto are true and attested copies of the petition for writ of error, the assignment of errors, filed in the Circuit Court December 20th, 1905, and the original citation on writ of error with acknowledgment of service thereon, all constituting true and attested copies of the record and proceedings in said cause with all things concerning the same.

In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court, at Wilmington, in said district, this sixth day of January, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and thirtieth.

[SEAL.] SAMUEL P. COLLIER, *Clerk.*

*Circuit Court of the United States, for the Eastern District of North Carolina, at Wilmington, in the Fourth Circuit.*

155 (Indorsement on cover:) File No. 20055. E. North Carolina. C. C. U. S. Term No. 553. Robert Sawyer and Arthur Adams, Plaintiffs in Error vs. The United States. Filed January 18th, 1906. File No. 20055

O

FILE COPY.

Supreme Court U. S.
FILED
JAN 25 1906
JAMES H. MCKENNEY,
Clerk.

No. 553.

# In the Supreme Court of the United States.

OCTOBER TERM, 1905.

ROBERT SAWYER AND ARTHUR ADAMS, PLAINTIFFS in error,

*v.*

THE UNITED STATES.

MOTION TO ADVANCE.

# In the Supreme Court of the United States.

OCTOBER TERM, 1905.

ROBERT SAWYER AND ARTHUR ADAMS, plaintiffs in error. v. THE UNITED STATES. } No. 553.

## MOTION TO ADVANCE.

The plaintiffs in error, together with one Henry Scott, were convicted in the Circuit Court of the United States for the Eastern District of North Carolina of mutiny and murder committed on the high seas, and sentenced to be hanged.

The Solicitor-General, on behalf of the United States, in accordance with section 6 of the act of February 6, 1889 (25 Stat. L., 656), moves the court to advance the cause on the docket and set it down for hearing on such day during the present term as shall be convenient to the court.

Notice of this motion has been served on counsel for plaintiffs in error.

HENRY M. HOYT,
*Solicitor-General.*

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# Supreme Court of the United States

OCTOBER TERM, 1905.

No. 553.

ROBERT SAWYER AND ARTHUR ADAMS,

PLAINTIFFS IN ERROR,

*vs.*

THE UNITED STATES.

## BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

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ROBERT SAWYER AND ARTHUR ADAMS.

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### STATEMENT OF THE CASE.

The schooner "Harry A. Berwind" sailed from Philadelphia on the 6th day of July, A. D., 1905, bound for Cardenas, Cuba. Her destination was first to Cardenas, thence to Mobile, Alabama; thence to Philadelphia. She had on board upon leaving Philadelphia, outward bound, a captain, E. R. Rummill; John Hall, mate; C. L. Smith, engineer; John Falbe, cook, all white men; and four seamen—Henry Scott, Arthur Adams, the Defendant; Robert Sawyer, the defendant, and one John S. Coakley, all negroes.

The schooner left Cardenas with all aboard, and arrived at Mobile. She left Mobile with all aboard September 23d, 1905, for Philadelphia, with a load of lumber under and on deck.

The vessel proceeded on her course after leaving Mobile toward her port of destination. On October 6th, in a squall, the topsail was lost, and on October 8th the vessel ran into a gale and carried away her rudder post. In this gale she sprung a leak and her pumps were thereafter kept continuously going.

On the night of October 10th, about 9 o'clock in the evening, the lookout on the American schooner "Blanche

H. King," reported a vessel ahead right in her course, carrying a red light in the upper rigging, and at times bearing across the course of the "Blanche H. King". The Captain of the "Blanche H. King" hailed the vessel, which proved to be the American schooner "Harry A. Berwind." As the "Blanche H. King" drew nearer the other vessel, Captain Taylor of the "King" hailed and asked what was the matter, and the reply came back from the "Berwind" that a man aboard had killed the captain, mate, engineer, steward, and had just killed a sailor. The captain of the "King" then asked what was wanted, to which the voice replied they wanted to be taken off. A boat from the "King" was sent alongside, and after some parleying Adams, the defendant, Sawyer, the defendant, and one Henry Scott were found to be all that were alive aboard, and were taken into the boat and carried to the "Blanche H. King". Scott was found aboard the "Harry A. Berwind", tied on the cabin house, and he was pointed out by Adams, the defendant, and Sawyer, the defendant, as the person who killed the captain, mate, engineer, cook and the seaman still aboard. The three men, Scott, Adams, the defendant, and Sawyer, the defendant, were then taken aboard the "Blanche H. King" and put in irons, and put down in the lazarette.

The "Harry A. Berwind" was placed in the hands of a prize crew, and both vessels were brought into Southport, North Carolina. The body of the dead sailor, Coakley, was still aboard when the "Berwind" reached Southport. nothing was seen of either the captain, the mate, the engineer and the cook of the "Harry A. Berwind" at the time she was boarded by the members of the crew of the "Blanche H. King" or afterwards.

In the United States District Court for the Eastern District of North Carolina, on the 1st day of November, 1905,

the grand jury returned an indictment against Arthur Adams and Robert Sawyer for the murders of E. R. Rummill, John Hall, C. L. Smith, John L. Falbe, and John S. Coakley on the 28th day of October, A. D., 1905, upon the high seas within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State thereof and within the jurisdiction of said court in and on board of a certain vessel of the United States of America, to wit, the schooner called the "Harry A. Berwind".

On the 4th day of November, 1905, when the jury empanelled for the trial of Adams and Sawyer were out, a bill of indictment was returned against Henry Scott for the murder of the same people.

In the venire so drawn many were summoned by telegram or telephone, and only a part of the special venire—to wit, 39 of the venire—appeared. The United States marshal, in open court, in the presence of the defendants, making the statement that summons had been made by telegram or telephone. The marshal made formal return of the writ.

While the jury was being empanelled on the trial of Arthur Adams and Robert Sawyer, several jurors were called, and as each juror appeared he was told by the district attorney to stand at the foot of the panel, without any challenge on the part of the Government and without an opportunity given to defendants to accept, challenge for favor or cause or to peremptorily challenge any and all of said jurors so stood aside.

To each and to every action in this respect on the part of the Government the defendants promptly and in due time objected, but the court overruled the objections, saying the State practice would be followed, and there was no United States Statutes on the subject; to which ruling of

the court the defendants then and there duly excepted. It appeared that neither the Government nor the defense had exhausted all their peremptory challenges when the jury was empanelled.

After the jury was empanelled the defendants challenged the array, assigning as grounds for challenge that the special venire of fifty summoned in the case, of which there had been accepted by defendants and were on the jury as empanelled, to wit, M. N. Caddell, R. I. Durham, and H. W. Hood, had been and were improperly summoned, the summons having been made on them by telegram or telephone, the admission as to the method of summoning them being made in open court by the United States marshal, but there was no evidence as to how the three persons aforesaid were summoned, except as appeared in the writ. But the court overruled the said challenge, and to this ruling of the court the defendants, by their counsel, duly excepted.

The only witness introduced by the Government testifying as to the killing was Henry Scott (R. pp. 15 and 22) and his examination was confined to such matters as were said to have taken place during the voyage of the "Harry A. Berwind" from Philadelphia to Cardenas, thence to Mobile, and thence on the return trip to Philadelphia. Scott admitted the killing of John S. Coakley, claiming he did it in self-defense, and placed upon Adams, the defendant; Sawyer, the defendant, and Coakley, the dead seaman, the entire responsibility for all the other murders, the witness stating that he (Scott) had no part in any plans or was not in any way concerned in them.

The only witnesses for the defence were the defendants, Sawyer and Adams, both of whom testified that the killing was wholly done by Scott and that they had taken no part whatsoever in it and in fact they testified that Sawyer himself was shot at by Scott. There was nothing in the

testimony in chief relating to any subject prior to the time the schooner, "Harry A. Berwind" left Philadelphia. Adams commenced his testimony from the time he joined the vessel "Berwind" in Philadelphia on July 6, 1905, and covered the ground only from that time to the time he with Sawyer and Scott was brought into Southport, North Carolina, on the schooner "King" in irons. On cross examination the District Attorney propounded to Adams the following question:

"Q. I will ask if within the latter part of the 15 months you were on the schooner 'Benefit' you did not have trouble and tried to create insubordination?" (Alluding to a voyage made by the defendant on the schooner "Benefit" a year or two before he became employed as a sailor on the schooner "Harry A. Berwind").

To which question the defendant, by his counsel, then and there objected, upon the ground that a defendant in a criminal case who has taken the stand and testified in his own behalf could only be cross-examined upon the matters and circumstances about which he had testified to in chief, or upon matters which tended to impeach his character for veracity, and could not be compelled to testify as to other crimes. The objection was overruled and the defendants duly excepted to such ruling. The exception was allowed. The District Attorney then proceeded to ask:

"Q. State what trouble you had on the 'Benefit'?

"A. I was never logged. The only trouble was that the cook gave me molasses to make tea, and I said that was not right, and myself and three other men went to the captain and asked him if he thought it was right. He said they did not have much sugar, and we would have to use molasses; and then I took the tea and threw it overboard and went forward.

"Q. Did you not, from that time on, during that voyage have continuous trouble aboard the 'Benefit'—and even after the captain had explained to you, you went and threw

your tea overboard and then went back and tried to create mutiny?

"A. No, sir; when I was told the second time there was no sugar and we had to use molasses, I said nothing more.

"Q. Did you not go back among the crew and try to create dissatisfaction?

"A. No, sir.

"Q. Did you not go and demand your wack?

"A. After we got out to sea, there were some complaints about our food.

"Q. Did the captain not threaten to put you in irons?

"A. No, sir."

In his argument to the jury the District Attorney, commenting upon the testimony of the defendant Sawyer as to his having gone to get coffee, said "A man under such circumstances who would drink coffee ought to be hung on general principle."

To which remarks by the United States Attorney the defendants, through their counsel at the time objected, having several times interrupted the United States Attorney during his argument to the jury. And before hearing defendants' counsel on the objection, the court remarked, "Mr. Peschau, do you want to cut the District Attorney off from making any argument?"

After which the court asked the District Attorney to confine himself to a proper argument, and the District Attorney expressed his regret if he had made an improper argument, and withdrew the remarks.

To both remarks of the District Attorney, and the comments of the court as made to counsel for the defendants, the defendants then and there objected and asked immediately to be allowed to file an exception. And upon this request to file an exception the Court replied:

"I will give counsel the benefit of his statement that he has made an exception which the court considers frivolous."

Immediately upon the close of the testimony, the de-

fendants by their counsel filed with the court prayers for instruction, and requested the Court in writing to put the charge in writing. Notwithstanding which the Court proceeded to charge on the law of conspiracy outside of and in addition to the written charge, to which action of the court, before the jury had retired, the defendants noted an objection, and upon the objection being overruled, reserved an exception.

The jury retired and returned a verdict of guilty as to both defendants, whereupon the defendants moved an arrest of judgment and for a new trial, both of which motions were denied, and an exception granted.

This case now comes to this court by writ of error to the Circuit Court of the United States for the Eastern District of North Carolina.

## Assignment of Errors.

First. The court erred in overruling defendants' motion in arrest of judgment.

Second. The court erred in permitting the United States attorney to arbitrarily stand certain jurors, without challenge, to the foot of the panel.

Third. The court erred in overruling the defendants' challenge to the array because of the improper method of summoning the special venire.

Fourth. The court erred in permitting the United States attorney to use, in his closing argument, and over the objection of defendants' counsel, improper language prejudicial to the defendants.

Fifth. The court erred in permitting the United States attorney, over the objection of defendants' counsel, to cross-

examine the defendant Adams with reference to his alleged insubordination on the schooner "Benefit".

SIXTH. The court erred in charging the jury that the defendants, Adams and Sawyer, were not charged with murder of Coakley, when the bill of indictment expressly charges them with the murder of Coakley as well as the others, and said charge had not been withdrawn; and this charge of the court tended to prejudice the defendants, because it nullified the effect of the admission of Scott that he alone had killed Coakley.

SEVENTH. The court erred in refusing or neglecting to put the whole charge in writing, although requested so to do, in apt time, by counsel for defendants.

(The above assignment of errors is the same as is contained in the Record at pages 104-105).

## POINTS.

### I.

*While the jury was being empanelled, several jurors were called and as each juror appeared he was told by the District Attorney to stand at the foot of the panel without any challenge on the part of the Government.*

At common law, prior to the reign of Edward I, the Government had the right to challenge as many jurors peremptorily as it pleased. This was the cause of great injustice to the defendants, and also caused great delay in the trial of cases. By the Statute of 33, Edward I, this right of peremptory challenge was taken away and the right of the prosecution to challenge jurors was limited to challenges for cause. There then sprang up the privilege of the

prosecution to stand venire men aside and put them at the foot of the panel.

United States *vs.* Marchant, 12 Wheat., 480.
United States *vs.* Shackleford, 18 Howard, 588.
United States *vs.* Douglas, 2 Blatchf. (U. S.) 207.
Seely *vs.* The State, 1 Ga., 213.
Mathis *vs.* The State, 31 Fla., 316.
Rex. *vs.* Parry, 7 Car. & P., 836.
Regg *vs.* Frost, 9 Car. & P., 129-136.
1st Chitty Criminal Law, 534.
Bacon Abr. Tit. Juries, E. 10.

"Originally, by the common law, the crown could challenge peremptorily without limitation as to number. By Act of Parliament passed in the time of Edward the First, the right to challenge was restricted to challenges for cause. But, *by a rule of court*, the crown was not obliged to show cause until the whole panel was called. Those not accepted on the call were directed to stand aside. If, when the panel was gone through, a full jury was obtained, it was taken for the trial. If, however, a full jury was not obtained, the crown was required to show cause against the jurors who had been directed to stand aside; and, if no sufficient cause was shown, the jury was completed from them."

Hayes *vs.* Missouri, 120 U. S., 68-71.

This practice was followed in this country only in the States of North Carolina, South Carolina and Pennsylvania.

By Section 30 of the Crimes Act of 1790, 1st Statute at Large, 119, persons indicted for treason against the United States were allowed thirty-five peremptory challenges and persons indicted for any other of the offences set forth in said act, for which the punishment is declared therein to be death, were allowed twenty peremptory challenges. At this time the Government was not entitled to any peremptory challenges.

The first case in the United States Courts bearing upon this subject appears to be a case of the United States *vs.* Marchant, 12 Wheat., 480, (decided in January Term, 1827), in which the Court says:

"Until the statute of 33, Edw. I., the crown might challenge peremptorily any juror, without assigning any cause; but that statute took away that right, and narrowed the challenges of the crown to those for cause shown. But the practice since the statute has uniformly been, and it is clearly settled, not to compel the crown to show cause at the time of objection taken, but to put aside the juror until the whole panel is gone through. Hawkins, on this point, says (Pl. Cr. b. 2, c. 43, ss. 2, 3): 'If the king challenge a juror before the panel is perused, it is agreed that he need not show any cause of his challenge, until the whole panel be gone through, and it appears that there will not be a full jury without the person so challenged. And if the defendant, in order to oblige the king to show cause, presently challenge, *touts paravaile*, yet it hath been adjudged that the defendant shall be first put to show all his causes of challenge before the king need show any.' And the learned author is fully borne out by the authorities which he cites, and the same rule has been recognized down to the present times."

This language of the Court is mere *obiter dicta* as the question was in no way involved in the decision of the case.

The next case in the United States Courts bearing on the subject is the case of the United States *vs.* Wilson, 1 Bald., 82, decided in 1830. The following is a quotation from the report of that case:

"The Court observed, that they had known no case where the right now claimed had been allowed to the prosecution; that they would not be the first to do it in a capital case, unless it was clearly established; but that on examining the opinion of the Supreme Court in the Case of United States against Marchant and Colson, 12 Wheat., 480, 484-485, they did not feel themselves at liberty to refuse the

qualified right of challenges now claimed by the United States. The law as laid down by that court is, that in England, the crown had an acknowledged right of peremptory challenges before the Statute of 33, Edw., I., which took them away, and narrowed the right down to those for cause shown; but that a uniform practice had prevailed ever since, down to the present time, to allow a conditional and qualified exercise of that right, if other sufficient jurors remained for the trial, by not compelling the crown to show cause at the time of objection taken out to put aside the juror until the whole panel is gone through, so that it appears there will not be a full jury without the person challenged."

The next case bearing upon this point in the Courts of the United States is the case of United States *vs.* Douglas, 2 Blatchf. (U. S.) 207, decided in 1851. This case was tried before Mr. Justice Samuel Nelson, Associate Justice of the Supreme Court of the United States, and Judge Samuel R. Betts, and Judge Nelson on the authority of the case of the United States *vs.* Marchant, held that the Government had the right to qualified challenge, namely, the right to stand jurors at the foot of the panel. Judge Betts, in a very able dissenting opinion, goes carefully into the law on the subject and shows conclusively that the right of the Government to qualified peremptory challenge did not exist and further states in the dissenting opinion as follows:

"The whole theory of criminal jurisprudence looks to placing the advantage, if one accompanies the case, on the side of the accused; and I think that, after the efforts most universaliy put forth in the United States to strengthen and extend such a privilege, particularly to a person on trial for his life, we are taking a long step backwards, in setting up the practices of the English Assizes, originating in an age of colder sympathy for human life than prevails in our era and in the jurisprudence of the United States. Accordingly, I regard it as far more consonant with the spirit of our institutions and the rules of criminal law sanctioned

by them, for this Court to adhere to the humane and guarded practice adopted in this State, than to recur to one drawn from an English Statute, (by means of a construction wearing more the appearance of maintaining a royal perogative against the will of the legislature, than of securing to a prisoner the pittance of favor accorded by it), which dates back to about the year 1300 to the reign of a Monarch who, in advance of the sentiment of his age, made most meritorious efforts to reform the condition of the law in his realm, both civil and criminal."

The next case in which this point is treated in the United States Courts is the case of the United States *vs.* Shackleford, 18 How., 588, (1855). This case was decided by Mr. Justice Nelson who had also delivered the opinion of the Court in the preceding case. In delivering the opinion of the Court in this case, Mr. Justice Nelson, says:

"The right of challenge in the cases specified in the act of 1790, in respect to the number of jurors, is derived from the common law, which allowed thirty-five in cases of treason, and twenty in cases of felony, 4 Bl. Com., 354-355, 12 Wheat., 483.

"That law also gave the King a qualified right of challenge in these cases, which had the effect to set aside the juror till the panel was gone through with, without assigning cause, and if there was not a full jury without the person so challenged, then the cause must be assigned or the juror would be sworn.

"The Court is of opinion that the right of challenge by the prisoner recognized by the act of 1790, *does not necessarily draw along with it this qualified right, existing at common law, by the Government;* and that, unless the laws or usages of the State, adopted by rule under the act of 1840, allow it on behalf of the prosecution, it should be rejected, conforming in this respect the practice to the State law."

Justice Nelson in this opinion expresses a grave doubt whether the right to stand jurors aside exists in the United States Courts.

Up to this time the Statutes of the United States did not give to the Government the right of peremptory challenge in the Courts of the United States.

On the third day of March, 1865, Congress passed the following law:

"That when the offense charged be treason or a capital offense, the defendants shall be entitled to twenty and the United States to five peremptory challenges. On a trial for any other offense, in which the right of peremptory challenge now exists, the defendant shall be entitled to ten and the United States to two peremptory challenges. All challenges, whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the Court without the aid of jurors."

This law, by Act of Congress, June 8, 1872, was amended as follows:

"That when the offense charged be treason or a capital offense, the defendants shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony, the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section. All challenges, whether to the array or panel, or to individual jurors, for cause or favor, shall be tried by the Court without the aid of triers."

Since these acts have been passed, the question of the right of the prosecution to stand jurors aside has only been considered in one case in the United States Courts so far as counsel for the Plaintiffs in Error have been able to discover and that was the case of the United States *vs.* Butler, 1 Hughes (U. S.) 457, decided in 1877. In that case (in which Chief Justice Waite of this Court, and Judge Hugh L. Bond, were sitting) the right was claimed by the prose-

cution to stand jurors aside without showing cause until the whole panel was exhausted. The report of that case states as follows, at page 467:

"For the prosecution it was contended that the right of qualified challenge in the courts of the United States was sustained by the Supreme Court of the United States in the case of the United States *vs.* Marchant & Colson, 12 Wheat., 480.

"The rule laid down in that case was subsequently followed in the Circuit Court for the Eastern District of Pennsylvania in the case of the United States *vs.* Wilson and Porter, 1 Bald., 78.

"The Court held that this rule was in force when the Government had no right of peremptory challenge but as the right of challenging jurors peremptorily has been given the prosecution, it should stand on the same footing with the defense, and either exercise the right of challenge at once or not at all."

This decision was rendered in the Columbia Circuit of South Carolina where the right of qualified peremptory challenge was recognized in the State practice.

State *vs.* Stevens, 13 S. C., 285.
State *vs.* Barronline, 2 Nott. & M., (S. C.) 553.
State *vs.* Wise, 7 Richl. (S. C.) 412.

In the case of State *vs.* Stevens, 13 S. C., 285, the Court says, however:

"The practice of directing jurors objected to by the State to stand aside until the panel is exhausted has been repeatedly recognized, and is too well established to be disturbed by this Court, *whatever may be our views as to its soundness in principle.*"

But we have seen that notwithstanding that this practice prevailed in the State Courts, Chief Justice Waite and Judge Bond decided that it did not exist in the Courts of the United States.

A case directly in point is the case of Mathias *vs.* The State of Florida, 31 Fla., 291, in which the Supreme Court of the State of Florida reversed a decision of the lower court principally on the authority of the case of the United States *vs.* Butler heretofore cited.

The case of Seely *vs.* State, 1 Ga., 213, is also directly in point and holds that the State having by Statute, been given the right to peremptorily challenge, the right of qualified challenge, which sprang up after the Statute of 33, Edward I, no longer exists. In closing its opinion on this point, at the bottom of page 217, the Court said:

"After mature consultation, then, on this alleged irregularity, *so deeply concerning the purity of trial by jury, and the rights of defendants,* the Court agree that the exception is well founded."

In the case at bar, Judge Purnell sitting in the Court below allowed the prosecution to stand the jurors at the foot of the panel because it was in accordance with the State practice. There can be no question but that in North Carolina the prosecution has this right.

State *vs.* Hensley, 94 N. C., 1021.
State *vs.* Jones, 80 N. C., 415.
State *vs.* Jones, 88 N. C., 671.
State *vs.* Bone, 7 Jones L., 121.

Judge Purnell erred, however, in adopting this practice in the Federal Court. At the time the case of the United States *vs.* Butler was decided, the practice also existed in the State of South Carolina but this practice was not followed by the Federal Court. Further than that, in the case of the United States *vs.* Shackleford, 18 Howard, 588, the Court distinctly says:

"The Court is of opinion that the right of challenge by the prisoner recognized by the act of 1790, does not neces-

sarily draw along with it this qualified right, existing at common law, by the Government; and that, unless the laws or usages of the State, adopted by rule under the act of 1840, allow it on behalf of the prosecution, *it should be rejected,* confirming in this respect the practice to the State law."

See also United States *vs.* Devlin, 6 Blatchf., 73
Lewis *vs.* United States, 146 U. S., 370.

It was not contended by the Government in this case that there was any rule in the Circuit Court of the United States for the Eastern District of North Carolina adopting the practice of the State in this particular.

Again in the case of the United States *vs.* Shackleford, the Court says:

"The Court is of opinion that the power conferred upon the Federal Courts to adopt 'rules and regulations for conforming the designation and impanelling of juries to the laws and usages in force at the time in the State,' enables them to adpot the laws and usages of the State in respect to the challenges of jurors, whether peremptory or for cause, and in cases both civil and criminal, *with the exception, in criminal cases, of treason and other crimes, of which the punishment is declared to be death.*

"The Section 30 of the crimes act of 1790, 1 Stats. at Large, 119, provides, that if persons indicted for treason against the United States shall challenge peremptorily above the number of thirty-five of the jury, or if persons indicted for any other of the offences before set forth, for which the punishment is declared to be death, shall challenge peremptorily above the number of twenty persons of the jury, the Court in any of these cases shall, notwithstanding, proceed to the trial of the persons so challenging, &c.

"This act of Congress having expressly recognized the right of peremptory challenge in the one case of the number of thirty-five jurors, and in the other of twenty, *they should be regarded as excepted out of the power conferred upon the courts to regulate the subject by rule or order under the aforesaid act of* 1840.

Under this decision, just quoted, the United States having provided by Statute the number of peremptory challenges the Government should be entitled to, the courts are without power to regulate the subject by rule or order so as to adopt the practice in vogue in the State Courts.

Counsel for the Plaintiffs in Error contend that the giving to the Government in this case the right of qualified challenge was a privilege to which it was not by law entitled, which was greatly to the injury of the defendants and which, as is stated in the case of Seely *vs.* Georgia, above referred to, "deeply concerns the purity of a trial by jury and the rights of the defendants".

The Act of Congress provides that in such a case as this the Government shall be entitled to five peremptory challenges. Would it not be error if a judge should allow them six or more such challenges?

It makes no difference whether or not the defendant has exhausted his peremptory challenges. The Government has been given a privilege to which by law it is not entitled. The legislature has determined as between the Government and the prisoner, that it is right and just that the prosecution should have five challenges and the accused twenty. If a judge should allow the Government an extra number of peremptory challenges, is that not, according to the Statute, unjust and illegal?

Justice Betts in the dissenting opinion in the case of the United States *vs.* Douglass, before cited, says as follows:

"Suppose the panel to consist of eighty jurors, (the number returned in the present case), and that it should so chance that one-half of the whole number are men free of impeachment by challenge for the principal cause or favor, yet so circumstanced as to have naturally strong prepossessions in support of the prosecution—for instance, that they are ship-owners, ship-masters and others, so connected with

maritime business as to feel honestly but deeply convinced that every act of a sailor at sea, tending to put in peril the lives of the officers, or the vessel or cargo, should be regarded with the greatest distrust of his motives and as justly requiring, at the hands of the seamen, most satisfactory evidence of his innocence, and that circumstances which, in other relations, would be regarded as slight or insignificant, should carry a weighty import when brought to bear against a sailor. The other half of the panel may be drawn from the ordinary employments of life, and be in no way, by their business, associations, or prepossessions, unfavorably impressed respecting the character and integrity of seamen as a class. On impanelling the jury, the District Attorney may set aside every one of the 40 who would deal dispassionately with the case, and drive the prisoner to exercise his peremptory challenges and those for cause upon the forty who stand naturally in a relation of distrust, if not of hostility, towards him. This, to the extent supposed, is put as an extreme case. But it marks distinctly the principle, and shows that the Government may be enabled to force upon the panel men who, unless constrained by overpowering evidence for the defense, would be ready to refuse the prisoner the benefit of an acquittal under almost any circumstances, and might even be inclined, upon testimony faintly criminating him, to render against him a verdict of conviction."

Suppose a defendant has exhausted all save one or a few of his peremptory challenges. The Government under a claim of right of qualified challenge has from time to time stood to the foot of the panel those who from association and environment would so far as human probabilities go, deal dispassionately with the case. The panel is by no means exhausted. The defendant is tendered a juror, free of impeachment by challenge for principal cause or favor, yet so circumstances as to have naturally strong prepossessions in support of the prosecution. The defendants consult the list of jurors. The remainder of the panel are known to be even more unfavorable to him. He accepts

the juror not because he desires it, but because he is forced to do so or to accept a more unfavorable one. If he makes this selection, does he suffer any the less by the arbitrary action of the Government in forcing him to such an alternation?

Does the fact that driven to the wall, he accepts a juror who may possibly turn out to be fair, rather than exhaust his challenges and be forced to accept a juror he is morally certain could under no conditions be fair—preclude him from seeking and securing relief? The action of the Government is responsible for his extremity, and is he, simply because he grasps the shadow of a hope and refused his own conviction at the outset, is he by such action to be cut off from any relief because his peremptory challenges were not used? Under moral conditions such a course is harmful and a fortiori where public opinion, through newspaper attacks, and the crystallization of public sentiment practically puts the burden of proving his innocence upon the defendant. Such a course is akin to persecution.

## II.

*The Court permitted the District Attorney to cross-examine Adams, who voluntarily became a witness on his own behalf and for Sawyer, with reference to his own conduct on a previous voyage and on a different vessel and nothing had been said about that matter in the examination in chief.*

Counsel for the Plaintiffs in Error submit that this cross-examination was improper and prejudiced the defendant Adams in the minds of the jury as indicating that he was a man of insubordinate disposition on board ship, mutinous, and, therefore, probably guilty of the mutiny and murder wherewith he was charged. The cross-examination referred to, neither questions nor answers, had any relevancy to the examination in chief nor to the case actually on trial.

Nor do we see how it had any tendency to impeach the veracity of the witness. It simply showed that Adams was quarrelsome and insubordinate about his food.

The rule as laid down by this Court in Fitzpatrick *vs.* United States, 178 U. S., 304, is

"When an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine him upon such statements with the same latitude as would be exercised in the case of an ordinary witness as to the circumstances connecting him with the alleged crime."

We respectfully insist that this cross-examination had no tendency to connect the defendant Adams with the alleged crime.

In Greenleaf on Evidence, Sec. 445, it is stated:

"The rule is now considered by the Supreme Court of the United States to be well established that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matter stated in his direct examination."

This was distinctly held in the case of R. R. Co. *vs.* Stimpson, 14 Peters, 448.

In People *vs.* Brown, 72 N. Y., 573, it is held that although a person on trial for a criminal case, by taking the stand as a witness, may subject himself to the rules applicable to other witnesses, he is not thereby deprived of his right as a party. His counsel may speak for him while he is a witness and an error of the Court committed against him may inure to his benefit as a party. In that case the Court further says:

"I am of opinion that the cross-examination or persons who are witnesses in their own behalf, when on trial for

criminal offences, should in general be *limited to matters pertinent to the issue, or such as may be proved by other witnesses.*"

We submit that it is clear that if another witness had testified to the exact facts testified to by Adams in his direct examination, such witness could not have properly been subjected to the same cross-examination as the Court permitted in the case of Adams.

We suppose, of course, that the Government would have the right to cross-examine the witness for the purpose of impeaching his testimony in any manner which would legitimately effect his credibility. This seems to be the rule deduced by Mr. Wigmore after a consideration of all the authorities.

Wigmore on Evidence, p. 3154, Sec. 2276 and
p. 3161, Sec. 2277.

See also Allen *vs.* United States, 115 Fed. Rep., 3.

In People *vs.* Crapo, 76 N. Y., 288 it was held that where, in a criminal trial, the accused is offered as a witness in his own behalf, in order to entitle the prosecution to put to him questions which are irrelevant to the issue and calculated to prejudice him with the jury, they must at least be such as clearly go to impeach his general character and his credibility as a witness. The Court in that opinion at page 292 said:

"While the practice has obtained to some extent of allowing questions to the witness, the answers to which would tend to impeach his credibility, the Courts have uniformly excluded questions which do not have that effect."

The cases of People *vs.* Brown, 72 N. Y., 571, and People *vs.* Crapo, 76 N. Y., 288, have been frequently cited with approval by the Court of Appeals of New York.

Van Bokkelen *vs.* Berdell, 130 N. Y., 141.

People *vs.* Patrick, 182 N. Y., 131, 212, Dissenting opinion of O'Brien, J.

It cannot be contended possibly that it would tend in any way to impeach the veracity of Adams as a witness by showing, if it were true, that he was insubordinate or insolent in his coduct on the schooner "Benefit" years before the crime under investigation.

In the case of Buel *vs.* State, 104 Wis., 132, the Court, at page 147, says:

"Text writers and adjudged cases are generally in accord that, so long as the cross-examination is carried on with reasonable fairness, to test the credibility of the witness, it is permissible, but the moment questions are asked concerning facts touching the witness's character, which are irrelevant to the facts in issue, for any other purpose than to effect his credibility or which manifestly do not bear on the subject of credibility, the right of cross-examination is abused, and on objection should be restrained within legitimate limits."

See also Baily *vs.* State, 67 Miss., 133.
State *vs.* Carson, 66 Me., 116.
People *vs.* Pinkerton, 78 Mich., 110.
State *vs.* Gotfreedson, 24 Wash., 398.
State *vs.* Hale, 156 Mo., 102.
Saylor *vs.* Commonwealth, 97 Ky., 184.
Nix *vs.* State, (Tex. Crim. App.) 74 S. W., 764.
Thompson on Trials, Sec. 653.
Bullock *vs.* State, 65 N. J. L., 557.
State *vs.* Barker, 68 N. J. L., 19.

The latitude of cross-examination in North Carolina seems to be broader than in most other jurisdictions in America, (State *vs.* Pancoast, 35 L. R. A., 518-519) and yet in State *vs.* Traille, 121 N. C., 674, it is definitely stated that such questions as those which were put to Adams on cross-examination must be confined solely to contradiction or impeachment and are not to affect the guilt or innocence of the accused.

It is error to allow the cross-examination of an accused who has taken the stand in his own behalf which could serve no other purpose than to prejudice him before the jury.

Allen *vs.* United States, 115 Fed. Rep., 3.
Howard *vs.* People, 96 Ill., 492.
Gifford *vs.* People, 83 Ill., 210.
Buel *vs.* State, 104 Wis., 132.
People *vs.* Molineaux, 62 L. R. A., 345-347, notes.

Even if such questions which had been put to Adams on cross-examination were answered in the negative, it is still error to allow the questions to be propounded.

Bates *vs.* State, 60 Ark., 450.
Gale *vs.* People, 26 Mich., 161.
People *vs.* Wells, 100 Cal., 459.

It can hardly be controverted that any other witness would not be allowed to testify as to the matter concerning which Adams was cross-examined.

In Smith *vs.* United States, 161 U. S., 85, on page 90, Mr. Justice Gray in delivering the opinion of this Court said:

"It is, to say the least, doubtful whether evidence of an arrest only, not followed by a conviction, is competent to affect the credibility of a witness. Ryan *vs.* People, 79 N. Y., 593. Van Bokkelen *vs.* Berdell, 130 N. Y., 141."

See also Morrison *vs.* Pettybone, 87 Fed. Rep., 320.

In the case at bar the defendant Adams was not even arrested for any misconduct but the question was intended to prejudice him with the jury by showing, and it was in fact shown, that he had formerly, on a different vessel, quarrelled about his food—the alleged motive for the present crime. It has been distinctly held by this Court that testimony of that kind is improper.

In the case of Boyd *vs.* United States, 142 U. S., 450, Justice Harlan, delivering the opinion of the Court, says on page 458, as follows:

"But we are constrained to hold that the evidence as to the Brinson, Mode and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the Government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death Upon careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offence charged."

Again, this Court in the case of Hall *vs.* United States, 150 U. S., 76, says:

"If the defendant had murdered the negro in Mississippi, and had been there convicted therefor, evidence, either of the murder, or of the conviction, would have been incompetent to support the indictment against him for the murder of Yates in Arkansas."

But admitting that such cross-examination would have been relevant simply for the purpose of impeaching the veracity of Adams, we submit that at any rate the Court should have instructed the jury that it was receivable only for that purpose and not having done so it is reversible error although the Court was not requested so to do.

State *vs.* Parker, 134 N. C., 209.

III.

*The Court erred in permitting the United States Attorney to use, in his closing argument, and over the objection of defendants' counsel, improper language prejudicial to the defendants.*

In his argument to the jury the District Attorney, commenting upon the testimony of the defendant Sawyer as to his having gone to get coffee, said:

"A man under such circumstances who would drink coffee ought to be hung on general principle."

To which remarks by the United States Attorney the defendants through their counsel at the time objected, having several times interrupted the United States Attorney during his argument to the jury. And before hearing defendants' counsel on the subject, the Court remarked:

"Mr. Peschau, do you want to cut the District Attorney off from making any argument?"

After which the Court asked the District Attorney to confine himself to a proper argument, and the District Attorney expressed his regret if he had made an improper argument, and withdrew the remarks.

To both remarks of the District Attorney, and the comments of the Court as made to counsel for the defendants, the defendants then and there objected and asked immedi-

ately to be allowed to file an exception. And upon this request to file an exception the Court replied:

"I will give counsel the benefit of his statement that he has made an exception which the Court considers frivolous." (R. p. 96).

The argument of counsel and remarks of the Court we respectfully submit are in the highest degree improper.

Thompson on Trials, Chap. 30.

We do not suppose that it would require argument to show that the language of the District Attorney was calculated, under the conditions under which these people were tried, to arouse prejudice and inflame the passions of the jury. We respectfully submit that they exceed in bitterness the natural exaggeration often used in the heat of argument and come within the class of remarks frequently condemned by the Courts.

Hall *vs.* West, 150 U. S., 76.
Graves *vs.* West, 150 U. S., 118.
United States *vs.* Williams, 168 U. S., 352.
Hawkins *vs.* United States, 116 Fed. Rep., 569.
State *vs.* Smith, 75 N. C., 306.
Coble *vs.* Coble, 79 N. C., 589.
Perry *vs.* W. N. C. R. R. Co., 128 N. C., 171.

We further submit that the action of the Court and the District Attorney upon objection made by the counsel for the defendants did not remove the prejudice naturally made by such remarks. It is true that the Court asked the District Attorney to confine himself to a proper argument, without saying whether the language was proper or not, and the District Attorney said that he did not want to make an improper argument and withdrew the remarks, but the Court rebuked the counsel for the defendants and strongly intimated that it was his purpose in objecting to

these remarks, not to safe-guard the rights of the defendants, but to prevent the District Attorney making his speech. In addition to that when counsel for defendants asked for an exception to these remarks the Court replied that he would grant an exception which in his opinion was *frivolous!*

"All courts agree that it is the duty of the presiding judge either of his own motion or upon the repuest of the opposing party or his counsel, to interpose and check the party or his counsel in an improper and prejudicial line of argument. * * * * The duty is a very plain one and good care should be taken to discharge it fully and faithfully."

Thompson on Trials, Sec. 958.

We submit that it must appear to the candid mind that the incident was prejudicial to the defendants in that the action of the Court tended to justify the comments of the District Attorney and unjustifiably to disparage counsel for the defendants, and it is to be also noted that the Court did not attempt in his charge to the jury to remove the bad impression thus made.

See Allen *vs.* United States, 115 Fed. Rep., 3.

*By this action of the Court in refusing to condemn the language of the District Attorney and to impress on the jury in emphatic terms* that they should not attach to the failure any importance whatever as a presumption against the defendant, the impression was left on the mind of the jury that if he were an innocent man he would have gone on the stand as the District Attorney stated he himself would have done."

Wilson *vs.* United States., 149 U. S., 60, 67.

As to what the Court should do under circumstances similar to that in question Thompson on Trials, Sec. 960, says as follows:

"An objection by an opposing counsel, promptly interposed, followed by a rebuke from the Bench and an admonition from the presiding judge to the jury to disregard the prejudicial statement, is generally, though not always, held sufficient to cure the prejudice."

Again, as to what is the duty of the Court in such a situation, this Court, in the case of Hall *vs.* United States, 150 U. S., at page 81, says:

"The attempt of the prosecuting officer of the United States to induce the jury to assume, without any evidence thereof, the defendant's guilt of the crime of which he had been judicially acquitted, as a ground for convicting him of a distinct and independent crime for which he was being tried, was a breach of professional and official duty, *which, upon the defendant's protest, should have been rebuked by the Court, and the jury directed to allow it no weight.*

"The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error; manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted, entitled him to a new trial."

In the case at bar the Court neither rebuked the District Attorney nor did he direct the jury to attach no weight to the argument. On the other hand he rebuked the defendant's counsel, which undoubtedly tended to prejudice the defendants with the jury.

How different the action of the Court in this case from that of the Court in the following cases:

Dunlop *vs.* United States, 165 U. S., 486.
Wright *vs.* United States, 108 Fed. Rep., 805.
United States *vs.* Alexander, 119 Fed. Rep., 1015.

The action of this Court in this case falls far short of what was done to remove the bad impression created by the language of the District Attorney in the cases last cited.

IV.

*The judge refused or failed to put his whole charge in writing although requested so to do at the proper time.*

By the Statutes of North Carolina, (Revisal of 1905, Sec. 536) and the decisions of the Court thereon, the law of North Carolina requires the judge to put the whole of his charge on the law in writing when requested so to do.

Dupree *vs.* Insurance Co., 92 N. C., 418.
Jenkins *vs.* Railroad, 110 N. C., 442.
State *vs.* Tyson, 133 N. C., 692.

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*Attorneys for the Plaintiffs in Error, Robert Sawyer and Arthur Adams.*

# In the Supreme Court of the United States.

OCTOBER TERM, 1905.

ROBERT SAWYER AND ARTHUR ADAMS, plaintiffs in error, *v.* THE UNITED STATES. } No. 553.

*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

The American schooner *H. A. Berwind* sailed from Philadelphia for Cardenas, Cuba, July 6, 1905, with a master, mate, engineer (for the donkey engine), and a cook or steward, all white, with four seamen, all colored, shipped at Philadelphia, three of them West Indians. There was quarreling between the crew and the officers and cook on the way down about the food and water, but no serious cause appears for the crew's complaints and the officers seem to have been conciliatory rather than harsh. (Rec., pp. 28, 36, 57.)

After the cargo was discharged at Cardenas the vessel proceeded to Mobile, where she lay for twenty-six

days (p. 60). At Mobile it seems that all four members of the crew purchased revolvers (p. 17). The *Berwind* sailed for Philadelphia with a cargo of lumber on September 23, 1905, and after passing through stormy weather, which disabled her, she was proceeding off the coast of North Carolina through the night of October 9–10, 1905. Between 4.20 a. m. on October 10 and 9 o'clock in the evening of the same day the four seamen, Scott, Adams, Sawyer, and Coakley, shot the three officers and the cook and forced them overboard while living, or threw their bodies overboard after they were dead (pp. 18–20, 29–30, 49–51). After these murders Scott shot and killed Coakley (pp. 21, 31, 52).

Scott swears that Adams, Sawyer, and Coakley committed the crimes; that he did not participate; was merely an unwilling witness of all that occurred, and, because of his own fear of death, was unable to oppose or prevent them; that they bound him with ropes and chains, and he killed Coakley in self-defense. Adams and Sawyer, on the other hand, swear that Scott committed all the murders alone and coerced and terrified them into acquiescence until they were able to seize and bind him. The truth appears to be that they were all responsible and willing participants; that a conspiracy had been formed, and that Scott was the ringleader, the three survivors having quarreled afterwards, and endeavoring in this way to cast the blame on each other. (Rec. *ut supra* and pp. 56–72.)

Responding to the signal of a red lantern hanging in the upper rigging, the American schooner *Blanche H. King,* coming up the coast the same night, sailed up to the *Berwind,* hailed her, received a response from Adams and Sawyer that Scott had murdered all the officers, and took the three men off, Scott being bound and the body of Coakley lying on the cabin roof of the *Berwind* (pp. 11, 15). All three of the men were immediately put in irons and confined by the master of the schooner *Blanche H. King;* he put some of his crew on board the *Berwinde,* and the two vessels proceeded into Southport, N. C., where the three seamen were turned over to the authorities (pp. 12, 27, 87). After investigation before two United States commissioners they were held for murder on the high seas. Adams and Sawyer were indicted in one bill, which was tried first, and Scott was indicted in a separate bill, which was tried afterwards (p. 89). Scott testified for the Government after being notified of his constitutional privilege, and Adams and Sawyer testified in their own behalf under a similar caution, and also against Scott. Scott did not sue out a writ of error, but was reprieved by the President, to be available as a witness in case there should be a new trial.

After the conviction of Adams and Sawyer there were motions for a new trial and in arrest of judgment, which were overruled. A bill of exceptions was filed December 4, 1905 (pp. 82–85), and then

an extension of time was granted and an amended bill of exceptions was filed December 21 (pp. 86–101).

**ASSIGNMENTS OF ERROR.**

These were (Rec., pp. 104–105): Standing jurors aside (second assignment); challenge to the array and manner of summoning certain jurors (third assignment); remarks of prosecuting attorney to jury (fourth assignment); charge of court respecting the killing of Coakley (fifth assignment); objection that the entire charge was not reduced to writing (sixth assignment;) cross-examination of defendant Adams (seventh assignment).

**ARGUMENT.**

## I.

STANDING JURORS ASIDE.

This objection is that "several jurors" were called and told by the United States attorney to stand at the foot of the panel without any challenge on the part of the Government and without any opportunity to defendants to accept, challenge for favor or cause, or peremptorily challenge (Rec., p. 90). But it also appeared that neither the Government nor the defense had exhausted all their peremptory challenges when the jury was empanelled (id.). How many jurors were stood aside does not appear. It is quite consistent with the record that even charging the jurors stood aside against the Government, its five peremptory challenges (R. S., 819) had not been exhausted; and it is certain the defendants

did not require all their peremptory challenges. These facts take all real force from the objection.

But examining the law, this right of the prosecution to stand aside temporarily is founded in a Crown privilege, and has always been widely recognized. The practice must be exercised under the supervision of the court, who will restrain it if applied to an unreasonable number of jurors. It began with the 33 Edw. I, which took away the unlimited peremptory challenges by the Crown, and required those suing for the King to challenge for cause. Yet the cause need not be shown till the whole panel was gone through. If the panel is exhausted before the jury is complete, then jurors set aside must be called and must serve unless challenged by either side (*United States* v. *Marchant*, 12 Wheat., 480; *United States* v. *Wilson*, 1 Baldw., 82; *United States* v. *Douglass*, 2 Blatchf., 207; *State* v. *Benton*, 19 N. C., 196.)

It is to be observed that in *United States* v. *Douglass*, as was pointed out by Judge Betts in his opinion (which was called a concurring opinion, although dissenting on this point), the rule was laid down, although the act of 1840 (5 Stat., 394) intended to conform regulations as to jurors to the respective State laws, and the New York law did not allow the standing aside of jurors.

In *United States* v. *Shackleford* (18 How., 588) the court recognized this right, but with some doubt, and expressed the view that the Federal practice in this respect should conform to State law.

The right of peremptory challenge was first given the Government by the act of 1865 (March 3; 13 Stat., 500), and this was amended by the act of 1872 (June 8; 17 Stat., 282; Rev. Stat., 819), by which, in the case of a capital offense the defendant is entitled to twenty and the United States to five peremptory challenges.

*United States* v. *Butler* (1 Hughes, 457) is the only case since the right of peremptory challenge was thus given to the Government in which the question of standing jurors aside has been considered. There the court held that "as the right of challenging jurors peremptorily has been given the prosecution, it should stand on the same footing as the defense, and either exercise the right of challenge at once or not at all."

So much for the Federal authorities, separately and distinctively considered; in which, however, the last view expressed by this court was (the *Shackleford case, ante*) that the State rule should be followed.

In the States of North Carolina, South Carolina, and Pennsylvania, as is conceded by the defense here, the rule is established. That is to say, the right of the prosecution temporarily to stand jurors aside is settled, although each of those States gives the prosecution the right of peremptory challenge, and although in two of these States (South Carolina and Pennsylvania) the prosecution and the defense have an equal number of peremptory challenges. (N. C.

Revisal, 1905, sec. 3264; S. C. Code, 1902, p. 242, sec. 5; Brightly's Dig. Pa. Laws, 1893–1902, p. 361, sec 3.)

In *Haines* v. *Com.* (100 Pa., 317), it was contended that as the Commonwealth was now entitled to peremptory challenges, the practice of standing jurors aside should be discontinued. The court, referring to the origin of the practice in the statute of 33 Edw. I, said that it had been so long continued and uniformly sanctioned that it had acquired the force of positive law; that there was nothing to indicate that the legislature intended any modification of the practice, "and therefore we have no right to interfere with it" (following *Warren* v. *Com.*, 1 Wright, 45); that the right claimed by the Commonwealth should always be exercised under the supervision of the court, and when that is done it is difficult to understand how the interests of the defendant can be unduly prejudiced.

See also *Smith* v. *Com.* (100 Pa., 324), and *Rudy* v. *Com.* (128 Pa., 500).

In *Com.* v. *O'Brien* (140 Pa., 555) the court was very brief on the subject, simply saying that the right of the Commonwealth to stand aside jurors is no longer an open question, citing the Haines, Smith, and Rudy cases, and stating that the rule was not changed by the law allowing peremptory challenges to the Commonwealth.

The courts of South Carolina take precisely the same view. Opposing counsel cite some of the cases

in order to disapprove of them (brief, p. 14); and I call the court's attention especially to *State* v. *McNinch* (12 S. C., 89), and *State* v. *Stephens* (13 S. C., 285). The principle has been firmly established in North Carolina from an early day.

*State* v. *Craton*, 6 Ired., 164.
*State* v. *Arthur*, 13 N. C., 217.
*State* v. *Benton*, 19 id., 196.
*State* v. *Bone*, 52 id., 121.
*State* v. *Jones*, 88 id., 1671.
*State* v. *Gooch*, 94 id., 982.
*State* v. *Hensley*, id., 1021.
*State* v. *Sloan*, 97 id., 499.

All of these cases were capital cases. The Hensley case is a well-considered and leading authority. The court shows the logic of the rule residing in the absence of prejudice to the defendant as follows (94 N. C., at p. 1029):

> These, and other like cases, rest upon the ground that the right of challenge is intended to secure a fair and impartial trial, and to that end to exclude from the jury persons objectionable for one or another just cause. It is no part of the purpose of the right of challenge to afford the prisoner opportunity to select a particular juror or jurors, most likely to acquit or to give him undue advantage. * * * His right is to have a jury fair, impartial, and free from just exception, and when the jury is selected without objection, the prisoner having the right to object further, it must be presumed conclusively that such a jury has been obtained.

The defendants concede the North Carolina rule, but object that under the decision in *United States* v. *Shackleford* (*ante*) the State practice must be adopted by rule of court in accordance with the act of 1840 (now sec. 800, R. S.); that there is no rule of the trial court adopting the North Carolina practice, and that in any event the power to adopt the law of the State would not extend to the matter of the challenges of jurors in the case of a capital crime. But the decision in the Shackleford case, rendered before the United States was entitled by statute to any right of peremptory challenge, related to the large number of challenges allowed to persons indicted for treason or other capital crimes by the Crimes Act of 1790 (sec. 30; 1 Stat., 119), and merely held that State practice adopted under rule of court could not cut down the number of these challenges given the defense.

Further, the latest authority on the point sustains our contention as to following the State rule. *Pointer* v. *United States* (151 U. S., 396) was a case of murder coming from the Western District of Arkansas, and the complaint there was the opposite of the present one, viz, that the Circuit Court should have followed the State practice but did not. The court, by Mr. Justice Harlan, held that while the court below was at liberty to pursue the method required by the law of Arkansas, it was not bound to do so; saying, among other things, on this point (p. 407):

> Congress has not made the laws and usages relating to the designation and empaneling

> of jurors in the respective State courts applicable to the courts of the United States, except as the latter shall by general standing rule *or by special order in a particular case* adopt the State practice in that regard.

Whether or not there was here a "general standing rule" in the Circuit Court adopting the State practice, it is plain there was a "special order" or ruling in this particular case. At page 90 of the record it is stated that each action of the district attorney in standing jurors to the foot of the panel was duly objected to by defendants, "but the court overruled the objections, saying the State practice would be followed, and there was no United States statute on the subject."

The Pointer case squarely held that a prisoner on trial in a Federal court for murder is not entitled to have the Government exhaust its peremptory challenges first. The court in that case also found that defendant had not been prejudiced by the method pursued, that the essential right of challenge to which he was entitled was fully recognized, that the right of peremptory challenge is not of itself a right to select but a right to reject jurors (citing *United States* v. *Marchant*, 12 Wheat., 480, and *Hayes* v. *Missouri*, 120 U. S., 68), and there was no reason to suppose that he was not tried by an impartial jury. The opinion also cites *Lewis* v. *United States* (146 U. S., 370, 379), as recognizing the authority of the Circuit Courts of the United States to deal with the subject of impaneling juries in criminal cases by rules

of their own. In that case a similar objection had been made, and the court said:

> We do not deem it our duty to prescribe in this opinion rules to regulate the discretion of the Circuit Courts in the impaneling of jurors in criminal cases. Perhaps the preferable course would be for the Circuit Courts to adopt the methods prescribed by the statutes of the States, because such methods are familiar to the bar and the people of the States. If, however, the Circuit Courts choose to deal with such matters by rules of their own, we think it essential that such rules should be adopted to secure all the rights of the accused.

At all events, it does not appear that prisoners were in any way prejudiced, either in the matter of the challenge to the array (see *post*) or the standing of jurors to the foot of the panel. They had a trial by a competent and impartial jury, and as they obtained such a jury from those who remained on the panel this was all they could demand. (*Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S., 642, citing *United States* v. *Cornell*, 2 Mason, 104, and State cases; *Hayes* v. *Missouri*, 120 U. S., 68, 71; *Brown* v. *New Jersey*, 175 U. S., 172, 175.)

The conclusion is that there is no doubt of the State practice; it is the proper practice for the Federal courts and was applied by the court in this case; the rule is reasonable and is subject to the discretion of the court to prevent the right under the rule from being exercised unreasonably; it was not exercised unreasonably in this case; the defendants obtained a fair

and impartial jury, which is all they were entitled to; neither the Government nor the defendants exhausted their challenges. It is to be remembered that the defense has twenty challenges and the Government five.

It is very evident that the defendants were not injured or prejudiced in fact by standing jurors aside, and it is idle to depict extreme cases of possible injustice. The undoubted tendency of the courts in reference to this matter is to ignore all technical objections as to impaneling the jury unless actual injury results.

## II.

### CHALLENGE TO THE ARRAY AND MANNER OF SUMMONING CERTAIN JURORS.

These objections are not pressed and indeed are not tenable. They came too late. Challenge to the array must be made before the jury is empanelled. The record here distinctly says that "after the jury was empanelled the defendants challenged the array" (p. 90). (*United States* v. *Butler*, 1 Hughes, 457, 463; *Gropp* v. *People*, 67 Ill., 154; *Mueller* v. *Rebhan*, 94 id., 147; *Goodman* v. *Goetz*, 36 N. Y., 731; *Jackson* v. *State*, 4 Tex. App., 292; *Mayor, &c.*, v. *Mason*, 4 E. D. Smith (N. Y.), 142; *State* v. *Douglass*, 63 N. C., 500.)

"If a juror attend the court for which he is regularly drawn, it is sufficient." (*United States* v. *Cornell*, 2 Mason, 91—an indictment for murder.)

Irregularities in bringing jurors into court are waived by a plea of not guilty. (*Com.* v. *Seybert*, 4 Pa. Co. Ct. Rep., 152.)

Where jurors are summoned by telephone (*Goodland* v. *Le Clair*, 78 Wis., 176; *People* v. *Burgess*, 153 N. Y., 561); where no positive injury resulted from obtaining a panel irregularly (*Wilhelm* v. *People*, 72 Ill., 468; *People* v. *Madison Co.*, 125 id., 334; *State* v. *McElmurray*, 3 Strobh. L. (S. C.), 337); where the defendants have not exhausted their peremptory challenges (*Franklin* v. *State*, 34 Tex. Crim. Rep., 625; *Williams* v. *State*, 29 Tex. App., 89; *State* v. *Clyburn*, 16 S. C., 375; *State* v. *Price*, 10 Rich. (S. C.), 356; *State* v. *McQuaige*, 5 S. C., 429) it has been held that challenge to the array is not tenable.

## III.

REMARKS OF PROSECUTING ATTORNEY TO JURY.

This objection (p. 96) is that in the course of his remarks to the jury, the district attorney, referring to the defendant Sawyer, said: "A man under such circumstances who would drink coffee ought to be hung on general principles." It appeared that, in the midst of the tragedy, seemingly after the captain and engineer had been shot and forced overboard and before the mate and cook had been killed, the accused made coffee and drank it and ate some bread (pp. 46, 50, 64, *et seq.*). While they were making the coffee, Adams and Sawyer watched Scott and the mate fighting and the mate sang out pleading "Sawyer, for God's sake help me!" (p. 50, 66, 67). But they did not go to his assistance nor interfere at all with Scott's bloody work, on their own story of the crime. In

commenting on this testimony the district attorney in the heat of argument said that men who could cook and eat and drink coffee under such circumstances ought to be hung on general principles. Doubtless this was said in the course of pointing out that the defendants' plain duty was to go to the rescue of their officers who were being slaughtered in their presence, even at the hazard of their lives, if they expected any jury to believe their improbable statements. The remark was natural enough and at the most was extravagant. No jury would be influenced to the prejudice of a defendant by any such heated and general statement. Considered in itself, it had no substantial relation to the issue or even to the credibility of the witnesses, but merely expressed the prosecutor's justifiable scorn and indignation at the defendants' callous inhumanity.

The control of argument is necessarily committed largely to the discretion of the trial court, and appellate courts will interfere only in cases where the trial court has refused to exercise its powers, or where it is manifest that its discretion has been abused by permitting prejudicial matters to be rehearsed to the jury in argument. (1 Thompson on Trials, sec. 964.)

In *Graves* v. *United States* (150 U. S., 118), where the trial court was held to be in error in permitting the district attorney to comment on the absence of defendant's wife from the trial, Mr. Justice Brown said:

> While we do not wish to be understood as holding that comments by the district attorney upon the facts not in evidence, or statements made having no connection with the case, or exaggerated expressions, such as counsel in the heat of trial are prone to indulge in, will necessarily vitiate a verdict, if not objected to, yet when the attention of the court is called to them specially, and objection is made, it is its duty to interfere and put a stop to them if they are likely to be prejudicial to the accused [citing *Wilson* v. *United States*, 149 U. S., 60; *Hall* v. *United States*, 150 U. S., 76].

In the Hall case as, apparently, in the Graves case, the trial judge declined to interpose, in spite of defendant's protest, against the district attorney's comments. The facts are different in the present case; upon defendants' counsel objecting, the court admonished the district attorney "to confine himself to a proper argument, and the district attorney expressed his regret if he had made an improper argument." (Rec., p. 83.)

The court gave "an exception which the court considers frivolous, but has already admonished counsel to confine himself to a proper argument, but the court will not put down in writing the words or comments as used to counsel for the defendants," all of which appears at pages 83 and 84 of the record. (Original bill of exceptions; amended bill, p. 96.) Now, the objection *was* frivolous; the remark could not be prejudicial to the accused, and the district attorney was duly admonished.

The books are full of illustrations of the indulgence extended by courts to extravagant declamation and exaggeration by counsel in argument. The rule is clear, viz, that to justify reversal the remarks must be plainly improper and of a material character "as to a substantive, outside fact, stated as a fact" (68 Ala., *ut infra*), likely to affect the defendant's rights injuriously. It is only necessary to cite a few of the authorities:

*Cross* v. *State*, 68 Ala., 476, 484.
*Pierson* v. *State*, 18 Tex. App., 524, 564.
*House* v. *State*, 19 id., 227.
*Shular* v. *State*, 105 Ind., 289, 302;
1 Thompson on Trials, sec. 964 *et seq.*
*State* v. *Griffin*, 87 Mo., 608, 615 (a defendant indicted for murder was called a "murderer").
*Polin* v. *State*, 14 Nebr., 540, 548 (the plea of insanity was referred to as generally a "sham" and "device").
*Combs* v. *State*, 75 Ind., 215.

In *State* v. *Stark* (72 Mo., 37) the prosecuting attorney said that "the defendant had gone to the Indian Territory, where all rascals go." The court on appeal held: "Defendant in his own testimony states that he went there. The additional words 'where all rascals go,' whether true or false, could certainly have had no effect upon the jury."

See also *State* v. *Hamilton*, 55 Mo., 520, 522; *Com.* v. *Nicely*, 130 Pa., 261, 269; *Thompson* v. *Barkley*, 27 Pa., 263; and *State* v. *Horner* (139 N. C., 606, 608), where the subject is again discussed, upon the use of the word "outlaw" by counsel for the State.

Opposing counsel cite (brief, p. 28) a decision of this court and two other Federal authorities, with the exclamation, "How different the action of the court in this case!" From an examination of those authorities, it is plain that the action of the court was not so very different, and that the proper comment is rather, "How different was the language of the prosecuting attorney" in those cases, either in itself (*Dunlop* v. *United States*, 165 U. S., at p. 498) or because of the peculiarly strong rule against commenting on the absence of the defendant's witnesses (*Wright* v. *United States*, 108 Fed. Rep., at p. 812). In the third case (*United States* v. *Alexander*, 119 Fed. Rep., 1015) the language is not shown, and it simply appears that the court stated to counsel in the presence of the jury in the most emphatic way that the language was improper and ought not to have been used, and as no further action by the court was requested and no exception taken, the language, whatever it was, was not ground for a new trial. Further, the court adds: "I do not believe that the defendant was prejudiced in the slightest by the remark," and that might be applied to the present case.

## IV.

CHARGE OF COURT RESPECTING THE KILLING OF COAKLEY; NOT REDUCING THE ENTIRE CHARGE TO WRITING.

These assignments are not pressed, the first not at all, the second not seriously. The charge (pp. 97–100) relieved the defendants of the killing of Coakley and plainly the error (as it turned out to be)

of including the killing of Coakley in this bill was thus entirely cured.

The charge was put in writing at the request of defendant's counsel (pp. 96 *et seq.*, p. 100). "The court then defined a conspiracy, giving the general definition as laid down by the Supreme Court," and the exception was that, although requested by counsel for defendants at the close of the testimony to put the charge in writing, the court "proceeded to charge on the law of conspiracy outside of and in addition to the written charge" (p. 100). This verbal charge is then quoted. No exception was taken to it as to substance, and, indeed, none could be. The objection simply was that it was not put in writing.

An oral statement not prejudicial to defendant does not violate that section of the North Carolina Code which requires a judge when requested in apt time to put his instructions to the jury in writing. (*State* v. *Dewey*, 139 N. C., 560, 562, and cas. cit.) "It is not the policy or purpose of the statute, nor does the language used bear such rigorous construction as to forbid any and all oral expressions from the presiding judge." (*Currie* v. *Clark*, 90 N. C., 355, 361; *State* v. *Crowell*, 116, id., 1052, 1057–8.)

Now, applying the principles of these decisions, the indictment (pp. 5, 89) did not charge conspiracy; it charged murder alone, and the defendants were not found guilty of conspiracy, but of murder. No exception could be taken to the written charge on the actual and substantive offense. It seems pretty

clear from the testimony as to a concerted purpose between these defendants and the other seamen, and from the reference by the court (p. 100) to the "prayer" of the Government, and from the Government's request for instructions as to the testimony of an accomplice (p. 99), that the court merely stated (and unexceptionably) the nature and legal effect of a conspiracy, because that was a pertinent feature of the entire case, and was preliminary in the sequence of events to the actual crime perpetrated and charged. The court was not then, in this oral deliverance, instructing the jury on the law of the case. The language was brief and informal; it was no doubt legitimately called for. If, however, it was perhaps unnecessarily interjected or added, it may be regarded as surplusage and ignored. It is clearly within the North Carolina rule and is not reversible error.

As to the North Carolina cases cited by the defendants (brief, p. 29)—in *Dupree* v. *Ins. Co.*, the court says that the law "only requires to be written and read to the jury * * * so much of the charge as embodies a proposition or principle of law which, if erroneous, admits of correction." In *Jenkins* v. *R. R. Co.* the reason is given why the defendant is entitled to insist on the entire charge as to the law being put in writing, viz, in order that the jury may take it with them on their retirement or to avoid disagreement between counsel as to its meaning in making up the case on appeal. As to *State*

v. *Tyson*, there is absolutely nothing on this subject. There the only exception was to the language of the prosecuting attorney, and the court held that being taken after verdict, it was too late.

## V.

### CROSS-EXAMINATION OF DEFENDANT ADAMS.

The examination in chief appears in the bill of exceptions (pp. 91–95) and in the body of the record (direct examination, pp. 28–32; cross, pp. 32–47; redirect, 47–48). On the cross-examination of Adams, after questioning the witness as to his experience as a seaman, the district attorney asked the question: "I will ask if within the latter part of the fifteen months you were on the schooner *Benefit* you did not have trouble and try to create insubordination aboard the *Benefit?*" (pp. 32–33). The defendant's objection to this question was that it was not within the scope of the examination in chief, nor the proper limits of cross-examination. The subsequent questions on the same line (p. 33) merely developed the fact that Adams had complained of the food on the *Benefit*. He denied insubordinate and mutinous conduct there. He answered all these questions in the negative.

Scott testified that Adams and Sawyer were quarrelsome about food and water on the way to Cuba; also while they were lying at Cardenas and on the way to Mobile (p. 16); that there was quarreling again after leaving Mobile (p. 17); that Sawyer

and Adams were quarreling about food the whole trip (p. 22). Adams in his direct examination attributed the quarreling to Scott and Sawyer (p. 28). He denied that there were any threats of mutiny made by the crew between Philadelphia and Cardenas, or Cardenas and Mobile (p. 32). He was being cross-examined as to circumstances touched upon in his direct examination constituting a cause of the crime finally perpetrated, and connecting him with it, and also to impeach his testimony. He had taken the stand in his own behalf, and had given in his examination a brief summary of his life, his birth at St. Vincents Island, his occupation as a sailor, etc. The cross-examination was clearly within the scope of the direct examination. When he was called on to particularize his life as a sailor, and the ships he had sailed on, and his conduct thereon, certainly if this testimony was impeaching in its tendency, it was competent. In any event, "its course and extent was subject to the control of the court in the exercise of a sound discretion, and is not reviewable on a writ of error." (Authorities, *post*.)

It is laid down that a defendant in his witness character is on the same footing as any other witness. This was recognized in the late case of *Fitzpatrick* v. *United States* (178 U. S., 304, 315). In general, cross-examination of a defendant witness in a criminal case is restricted to the matter of the examination in chief and to matter affecting his credibility. Some special indulgence is shown to a defendant

witness when as to a particular question the privilege against self-incrimination is invoked, but that feature does not enter here. On the other hand, when, as here, the privilege does *not* complicate the case, a witness who is a party subjects himself to especial latitude in cross-examination, and there are authorities to that effect. That is to say, it is also a general principle of evidence that when a party is a witness he may be cross-examined on matters not within the direct examination, the course and extent of such cross-examination being committed to the control of the court in the exercise of a sound discretion, which is not reviewable on writ of error. This doctrine has been distinctly stated by the court in civil suits (*Storm* v. *United States*, 94 U. S., 76; it does not clearly appear whether or not the witness was a party). There the court said (p. 85):

> It is plainly within the discretion of the presiding judge to determine whether, in view of the evidence previously introduced and of the nature of the testimony given by the witness in his examination in chief, it is fit and proper that questions of the kind should be overruled, and to what extent such a cross-examination shall be allowed.

In *Rea* v. *Missouri* (17 Wall., 532, 542), the virtual plaintiff was the witness, and the court (by Bradley, J.) used language, which I have closely followed above in stating the principle, and which was quoted and approved in *Davis* v. *Coblens* (174 U. S., 719, 727). The same doctrine was approved

in *Blitz* v. *United States* (153 U. S., 308) (an indictment for illegal voting); the question asked witness was excluded, and that action of the trial court was sustained under this principle, the court saying (p. 312):

> If the object was to test the accuracy or credibility of the witness, it is quite sufficient to say that the extent to which a cross-examination may be allowed for such a purpose * * * is largely subject to the sound discretion of the trial court, and the exercise of that discretion is not reviewable upon writ of error.

Manifestly, if a different question were admitted, the same principle of control by the discretion of the court would be applicable.

See also *Allen* v. *United States* (115 Fed. Rep., 3, 11), where the court said, referring to the cross-examination of the defendant, that if it had been confined to the purpose of bringing out facts that had any specific relation to the offense alleged, or of impeaching or discrediting witness, "it would have been the duty of the court to have allowed great latitude in the cross-examination of this witness, and the questions allowed would have been largely within the reasonable discretion of the court."

Why should not this rule of liberality in cross-examining a party witness be equally applicable in criminal and civil cases, if there is no reason founded in a claim of privilege for guarding the defendant character against the witness character? I submit

that the requirements of a person's position as a witness should be maintained and should not be sacrificed to a possible or mere incidental infringement on his position as defendant.

On this point it is interesting to note that in Indiana the Civil Code provided (R. S. 1838, p. 275; Civil Code, sec. 242) that general moral character was admissible on cross-examination in civil cases, which was construed to extend to specific moral traits. (*Walker* v. *State*, 6 Blackf., 3; *Indianapolis, &c., Ry. Co.* v. *Anthony*, 43 Ind., 183, 193.) Originally this rule was treated as not applicable in criminal cases (*Fletcher* v. *State*, 49 Ind., 131), but in 1881 it was extended to criminal cases. (R. S. 1881, sec. 1803.)

These ideas are all in accordance with the general recent current of free cross-examination and restriction of a defendant's protection and privileges to his actual needs at the present day. The two theories of cross-examination to discredit are formulated, on the one hand, by Scroggs, L. C. J. (1680), who said in Lord Castlemaine's trial (7 How. St. Tr., 1067, 1084): "You may give in the evidence of every record of the conviction of any sort of crimes he has been guilty of;" and, on the other hand, by Holt, L. C. J., in *R.* v. *Warden of the Fleet* (12 Mod., 337, 341), as follows: "In respect to a person who had been burnt in the hand [for manslaughter and afterwards pardoned] it were no objection to his credit;" but otherwise as to stealing, even with pardon. Now, the more humane

and logical rule of Lord Chief Justice Holt is undoubtedly established, and the courts of our day insist on decency in cross-examination, but it is nevertheless true that "the more modern practice seems to have maintained this theoretically unlimited license of cross-examination even after the middle of the 1800's, when the privilege against disgracing answers was no longer recognized." (2 Wigmore on Evidence, sec. 986, p. 1123, and *passim*, with notes and authorities.)

Coming to our own rules, it is certainly true that throughout the many jurisdictions in the United States, and amid conflicting decisions and contrary practice, the weight of authority commits the control and scope of cross-examination to the discretion of the court, and permits any witness to be impeached on cross-examination, always by questions going to his veracity, generally by questions directed at his reputation in allied respects, honesty, probity, integrity, often by general character, and, less frequently, but still in numerous cases, by specific instances of other misconduct than the different varieties of the *crimen falsi*.

The impeachment of a defendant as witness, the scope of his cross-examination, and the admissibility of character evidence to impeach, are discussed in Wigmore (vol. 2, secs. 889–891, pp. 1013–1016; sec. 922, 923, pp. 1058–1061); the note to section 924 collects the State authorities on bad character in general and specific traits; sections 925 and 926 distinguish between bad character as witness and party,

and consider the use of prior convictions and other instances of misconduct, pages 1062–1066; (see also sec. 987 and note, for "scope of cross-examination;" sec. 983, pp. 1111, 1126, vol. 3, sec. 2277, p. 3159.)

A few courts dealing with *specific misconduct on cross-examination* permit the use only of misconduct directly bearing on credibility, but *most courts* make no attempt to do this. (Wigmore, *ut sup.*, secs. 925, 926.) Sometimes decisions of the same State are at variance with each other on this point of specific misconduct on cross-examination (notes to sections last cited).

But, however the rule may be elsewhere, the law of North Carolina admits great latitude on cross-examination; bad character may be shown, and, it seems, specific instances of misconduct as well.

In *Fitzpatrick* v. *United States* (*ante*), a case of murder coming from Alaska, the court cited decisions of Oregon, where the restrictions on cross-examination of a defendant witness appear to be somewhat rigorous, doubtless for the reason that the laws of Oregon were applicable to offenses committed in Alaska. It is of course evident that in the present case the state of the law in North Carolina is of the utmost importance, if not controlling. It is held that ever since 1804 it has been the established rule of practice to discredit a witness by making proof of his general bad moral character, and the question need not be restricted to his reputation merely for veracity. "As the prisoner assumed the character of a witness, he

must needs come under the same law," and this rule continues to be the law of evidence as administered in the courts of North Carolina. (*State* v. *Efler*, 85 N. C., 585, 588, citing *State* v. *Boswell*, 2 Dev., 209; *State* v. *O'Neale*, 4 Ired., 88; *State* v. *Dove*, 10 Ired., 469; *State* v. *Parks*, 3 Ired., 296; see also *State* v. *Stallings*, 2 Hayw., 300.)

In *State* v. *Thomas* (98 N. C., 599) the court thus describes the line of inquiry: "The testimony sought to be elicited in this case was disparaging only and would not expose the witness to the perils of a criminal prosecution if true, for that is assumed to have already taken place." The indictment was for murder, and the prisoner was examined as a witness on his own behalf, and the first objection was the compelling him to tell with what crime he was *charged* before removing from Alabama. Manifestly this was specific misconduct not necessarily going to veracity and was matter of accusation rather than conviction. The main point ruled was that if a person charged with crime voluntarily testifies in his own behalf, he waives his privilege of refusing to answer on the ground of self-incrimination, and various State cases are reviewed in which such questions as the following were asked and sustained: "Have you ever been arrested before for theft?" Citing the Efler case, the court says:

> When a person on trial * * * shall avail himself of the right * * * to become a witness on his own behalf, he occupies

> as such the same position that any other witness would, and exposes himself to the same discrediting and impeaching evidence.

The question was sustained and the judgment affirmed.

The rule in the western jurisdictions is generally more strict; but I select a typical leading case, as showing the reasonable limits of the protection claimed where less latitude is allowed than in North Carolina. In *State* v. *Pancoast* (Supreme Court of North Dakota, 35 L. R. A., pp. 518, 527, 533) the particular questions on cross-examination are not shown, and a claim of privilege was made, but it was held that this claim was not made with sufficient definiteness, the questions were sustained, and the judgment of conviction affirmed. The court states the object of cross-examination, viz, to weaken the force of the testimony given in chief, and holds that to this end it is proper to show the relations of the witness to the case and the parties and the facts, his interest, his motives, his means of knowledge, etc., "and subject to the constitutional privilege of a witness to refuse to answer questions the answers to which may tend to criminate him, it is proper to show collateral facts that might tend to criminate, disgrace, or degrade the witness, if such other facts tend to weaken his credibility," citing authorities.

The doctrine is laid down that a defendant witness subjects himself to the same rules of cross-examination as other witnesses, "with the exception that his

privileges are to some extent curtailed in that he is not only required to answer any relevant and proper question on cross-examination that may tend to convict him of the offense for which he is being tried, but he must also answer any such relevant and proper question that may tend to convict him of any collateral offense when such answer also tends to convict him of the offense for which he is being tried, or bears upon any of the issues involved in such case," citing many authorities.

It is submitted that at every point the present case is within the rule of *State* v. *Pancoast*.

But whatever the view might be as to the propriety of this cross-examination, there are two final reasons why reversible error can not be predicated on this objection. The answers to these particular questions and the other like questions were all in the negative. Now, while as a speculative question it has been suggested that it is inaccurate to say that the witness's answer, if in the negative, "must be taken for true," because all that could be said is that the prosecutor only accepts the chances of the jury believing a negative answer; nevertheless the rule is well established as a practical matter that the State is bound by the answer. "Nothing is better settled than that where a witness is asked as to collateral crimes for this purpose [affecting credibility] his answers are absolutely conclusive on the party asking." (*State* v. *Pancoast*, *ut sup.*, p. 533, citing 3 Rice on Ev., sec. 222; see also *People* v. *Jackson*, 3 Park Cr., 391; *Oxier* v.

*United States*, 38 S. W., 331; *Newcomb* v. *Griswold*, 24 N. Y., 298; 1 Starkie on Ev., 190.) The witness-defendant is not prejudiced and no reversible error has been committed.

The decisions cited by opposing counsel to the contrary (*Bates* v. *State*, *Gale* v. *People*, *People* v. *Wells;* brief, p. 23) merely show first, that irrelevant questions calculated to prejudice a defendant may be asked if they clearly go to impeach his general moral character and his credibility as a witness; and this is in our favor; second, that the courts will restrain prejudicial questions, assuming the existence of damaging facts and put with such persistency and show of proof as to impress the jury, even though the prisoner denies them and there is no other evidence; that is, "an insinuating style of questioning" will not be permitted. (*State* v. *Pancoast ut sup.*, 35 L. R. A., p. 532.)

Again, while counsel objected to this question, they did not follow up that objection by requesting the court to charge the jury, if the testimony were admitted, that it could only be considered by them on the question of veracity. The testimony being admissible on the point of credibility at all events, for what it might be worth, the defendants must be held to have waived further objection by not taking this course; and the court was not bound to give instructions upon that particular question since they were not requested. (*Com.* v. *Kneeland*, 20 Pick., 206, 222; *Hodge* v. *State*, 85 Ind., 561; *Powers* v. *State*, 87 id., 144, 153; *Ed-*

*wards* v. *State*, 47 Miss., 581, 589; 2 Thompson on Trials, secs. 2339, 2341, 2343.)

The cases cited by the defendants on this point merely holds that where *corroborative* evidence is introduced, it is the duty of the court, although not requested, to instruct the jury that it was to be considered as corroborative and not as substantive testimony. (*State* v. *Parker*, 134 N. C., 209, 213.)

I respectfully submit that there is no error in this record and that the judgment below should be affirmed.

HENRY M. HOYT,
*Solicitor-General.*

C

# Supreme Court of the United States.

No. 553.—October Term, 1905.

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| Robert Sawyer and Arthur Adams, Plaintiffs in Error, *vs.* The United States. | In error to the Circuit Court of the United States for the Eastern District of North Carolina. |

[April 30, 1906.]

The writ of error in this case brings before this court a judgment of conviction of murder, rendered in the Circuit Court of the United States for the Eastern District of North Carolina.

The plaintiffs in error were indicted at the fall term, 1905, of the United States District Court for the Eastern District of North Carolina, Wilmington Division, for the murder, by shooting, on the 28th day of October, 1905, of E. R. Rumill, captain; John T. Hall, mate; John Falbe, cook; C. L. Smith, engineer, and John S. Coakley, seaman, committed on the high seas and within the jurisdiction of the court wherein the indictment was found, and on board of the American vessel called the Harry A. Berwin. The indictment alleged that after the shooting the deceased were thrown into the sea. Upon the trial of the plaintiffs in error in November, 1905, in the United States Circuit Court for the Eastern District of North Carolina, to which court the indictment had been duly transferred for trial, they were convicted of the murder of the first four named in the indictment. The court told the jury that the defendants were not charged with killing Coakley, and if charged in the bill there was no evidence to support the charge.

There is no question made as to the sufficiency of the indictment or of the jurisdiction of the court.

It appeared on the trial that the plaintiffs in error were part of the crew, and, together with one Henry Scott, who was also one of the crew, were the only living persons found on the Berwin, when they were arrested by the crew of a small boat, that was put off from a schooner called the Blanche H. King, which was then proceeding on a voyage up the coast from Brunswick, Georgia, to Philadelphia, Pennsylvania, and had arrived at a point about thirty-two miles southwest from Cape Fear bar. The attention of Captain John W. Taylor of the schooner was directed about nine o'clock in the evening in the month of October, 1905, to a vessel just ahead of him, on account of the manner in which she was carrying her lights, and because she was right in the track of his own vessel. He sent a small boat, manned by several seamen, to the vessel, (which proved to

be the Berwin,) and the boat brought back the plaintiffs in error and Scott, who, on being brought to the deck of the vessel and telling their story, were put in irons by direction of the captain, who then steered his vessel for the nearest port, which was Southport, North Carolina, where the men were delivered to the Federal authorities. Upon the trial of the indictment which was found against the plaintiffs in error, the man Scott was called as a witness, and swore to the murder by the plaintiffs in error while the vessel was at sea, and on or about October 28, 1905.

Scott was subsequently indicted alone for the murders, and was also convicted, the plaintiffs in error being witnesses against him, and they testified that he committed the murders. He has been reprieved by the President, so that he may be again used as a witness against the plaintiffs in error in case of a new trial being granted to them.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The first question to be noticed in this case arises by reason of these facts: When the case was called for trial the clerk proceeded to call the names of the jurors, and the record shows that:

"While the jury was being empaneled several jurors were called, and as each juror appeared he was told by the district attorney to stand at the foot of the panel, without any challenge on the part of the Government and without an opportunity given to defendants to accept, challenge for favor or cause, or to peremptorily challenge any and all of said jurors so stood aside.

"To eac[illegible] and to every action in this respect on the part of the Government the defendants promptly and in due time objected, but the court overruled the objections, saying the State practice would be followed, and there was no United States statute on the subject; to which ruling of the court the defendants, by their counsel then and there duly excepted, and the exceptions were allowed. It appeared that neither the Government nor the defense had exhausted all their peremptory challenges when the jury was empaneled."

The inquiry is, whether the court had the power to permit such conditional challenge by the Government?

The origin of this practice is stated by Mr. Justice Field in delivering the opinion of the court in *Hayes* v. *Missouri*, (120 U. S. 68–71.) It is there said:

"Originally, by the common law, the Crown could challenge peremptorily without limitation as to number. By act of Parliament passed in the time of Edward the First, the right of challenge was restricted to challenges for cause. But, by a rule of court, the Crown was not obliged to show cause until the whole panel was called. Those not accepted on the call were directed to stand aside. If, when the panel was gone through, a full jury was obtained, it was taken for the trial. If, however, a full jury

was not obtained, the Crown was required to show cause against the jurors who had been directed to stand aside; and, if no sufficient cause was shown, the jury was completed from them."

The question here involved was not directly before the court in that case, but the accuracy of the statement is not questioned. It is not disputed that the practice has prevailed in the State of North Carolina ever since the foundation of the State, and it has also prevailed in South Carolina and Pennsylvania.

In 1790 Congress provided for granting certain peremptory challenges to the defendant, (1 Stat. 119,) but no peremptory challenge was allowed to the Government.

While the Government was thus situated in regard to peremptory challenges the case of *United States* v. *Marchant*, (12 Wheat. 480,) came before the court. The question directly involved was whether persons jointly charged in the same indictment for a capital offense had a right by law to be tried separately without the consent of the prosecutor, and it was held that persons so jointly charged had not that right, but that such separate trial was a matter to be allowed in the discretion of the court. In the course of the opinion, however, which was delivered by Mr. Justice Story, it was stated as follows:

"But a still more direct conclusion against the right may be drawn from the admitted right of the Crown to challenge in criminal cases, and the practice under that right. We do not say that the same right belongs to any of the States of the Union; for there may be a diversity in this respect as to the local jurisprudence or practice. The inquiry here is, not as to what is the State prerogative, but, simply what is the common law doctrine as to the point under consideration. Until the statute of 33 Edw. I, the Crown might challenge peremptorily any juror, without assigning any cause; but that statute took away that right, and narrowed the challenges of the Crown to those for cause shown. But the practice since this statute has uniformly been, and it is clearly settled, not to compel the Crown to show cause at the time of objection taken, but to put aside the juror until the whole panel is gone through. Hawkins, on this point, says (Pl. Cr. b. 2, ch. 43, s. 2, s. 3) if the King challenge a juror before the panel is perused, it is agreed that he need not show any cause of his challenge till the whole panel be gone through, and it appears that there will not be a full jury without the person so challenged. And if the defendant, in order to oblige the King to show cause, presently challenge, *touts paravaile*; yet it hath been adjudged that the defendant shall be first put to show all his causes of challenge before the King need to show any. And the learned author is fully borne out by the authorities which he cites, and the same rule has been recognized down to the present times.

"This acknowledged right of peremptory challenge existing in the Crown before the statute of 33 Edw. I. and the uniform practice which has prevailed since that statute, to allow a qualified and conditional exercise of the same right, if other sufficient jurors remained for the trial, demonstrate, as we think, that no such power of selecting his jury belongs, or was ever supposed to belong, by the common law, to the prisoner; and

that, therefore, he could not demand, as matter of right, a separate trial to enable him to exercise it. In a separate or joint trial he could at any time be defeated by the Crown of such a choice, by its own admitted prerogative."

It is true that the matter involved in the Marchant case did not call for this statement, as the direct question was not in issue. It was made argumentatively, as one reason for denying the right claimed by defendant in that case. Subsequently the Circuit Court of the United States in Pennsylvania, in 1830, followed the views expressed in the Marchant case. (*United States* v. *Porter*, 1 Bald. 78.) In that case the right was claimed by the district attorney and denied by counsel for defendant, but was allowed by the court upon the ground that it considered the opinion of the Supreme Court as a recognition of the qualified right of the United States to challenge, and directed the juror to be put aside until the panel was exhausted, declaring that if that should happen and the juror be again called the United States could not then challenge him without showing cause.

Again, in the case of *United States* v. *Douglass*, (2 Blatch. 207,) which was decided in 1851, this qualified right of challenge was conceded to exist by Mr. Justice Nelson, who presided on the trial in that case, but was denied by District Judge Betts, who sat with him. The case was tried in the Southern District of New York, in which State no such right of conditional challenge existed. A motion for a new trial was made before the same court, and Judge Nelson said in his opinion, in denying the motion, that "this qualified right of challenge without cause is the settled doctrine of the common law, and has been recognized by the Supreme Court of the United States in the case of *United States* v. *Marchant*, (12 Wheat. 480,) and has been practiced upon in some of the circuits." The judge then said that the doubt as to the right of the Government arose by reason of the passage of the act of July 20, 1840, (5 Stat. 394,) providing for the designation of jurors to serve in the Federal courts, and empowering those courts to make rules and regulations for conforming the designation and empaneling of jurors to the laws and usages of the States as they may exist at the time. A rule to that effect had been adopted in the Southern District of New York. The justice further stated in his opinion that the act of 1840 applied only to the mode and manner of drawing or selecting the jury—that is, by ballot, lot or otherwise—as prescribed by the State laws, and that it did not affect the questions involved in the right of challenging the jurors called, whether peremptorily or for cause; and that those questions stand upon the common law, except where regulated by the act of Congress. Judge Betts, in his opinion, which is set forth in th report, held that no such right existed, certainly not in the States where such practice was not recognized.

In 1855 the case of *United States* v. *Shackelford*, (18 How. 588,) came before the court. It arose on a certificate of difference of opinion between the judges holding the Circuit Court of the United States for the District of Kentucky. The question was whether the defendant, who was indicted for a misdemeanor, was entitled to any peremptory challenges, and, as the judges were divided in opinion, they certified the question of difference to this court. Mr. Justice Nelson, in delivering the opinion of the court, stated that the power conferred upon the Federal courts under the act of 1840, *supra*, enabled those courts to adopt rules and regulations for conforming the designation and empaneling of jurors to the laws and usages in force at the time in that State, and that by virtue of that act the courts were enabled to adopt those laws and usages in respect to challenges of jurors, whether peremptorily or for cause, and in cases both civil and criminal, with the exception therein stated. It was further held that, as the act of 1790, (1 Stat. 119,) gave persons indicted for treason a certain number of peremptory challenges, etc., that act expressly recognized the right of peremptory challenge, and the right should be regarded as excepted out of the power of the courts to regulate the subject by rule or order under the aforesaid act of 1840. Mr. Justice Nelson further observed as to the common law that it "gave to the King a qualified right of challenge in these cases, which had the effect to set aside the juror till the panel was gone through with, without assigning cause, and if there was not a full jury without the person so challenged, then the cause must be assigned or the juror would be sworn." Continuing, he said:

"The court is of opinion that the right of challenge by the prisoner recognized by the act of 1790 does not necessarily draw along with it this qualified right, existing at common law, by the Government, and that, unless the laws or usages of the State, adopted by rule under the act of 1840, allow it on behalf of the prosecution, it should be rejected, conforming in this respect the practice to the State law."

In the case before us the laws or usages of the State permitted this qualified right of challenge by the Government. No case in this court has been cited, nor have we found one, that decides the question now before us. Those which we have referred to, whether of this court or the Circuit Courts of the United States, were at any rate decided before the passage of the act of Congress of 1865, (13 Stat. 500,) amended in some particulars by the act of 1872 (17 Stat. 282.) These statutes gave peremptory challenges to the Government, and the question now presented is whether after Congress has dealt with the subject of such challenges the former qualified right of challenge on the part of the Government still exists in those States where such practice obtains, and the practice has been adopted by a rule of court in the courts of the United States. Section 800 of the Revised Statutes of the United States in substance repro-

duces the act of 1840, above referred to, so that the subject must be considered with reference to that section as well as the statute which gives challenges to the Government.

The question arose in *United States* v. *Butler* (1 Hughes, 457–467.) The trial was held before Chief Justice Waite and Judge Bond in the United States Circuit Court for the District of South Carolina in April, 1877. Upon the empaneling of the jury a juror was called and was examined on his *voir dire*, and was then told by the counsel for the Government to stand aside. The defense objected, and insisted that the prosecution must either exercise the right of challenge or waive it entirely and at once. The court held that this rule was in force when the Government had no right of peremptory challenge, but as the right of peremptory challenge had been given to the prosecution it should be given the same right with the defense and should exercise the right at once or not at all.

This decision of the Federal Circuit Court is the only one brought to our attention that has been decided since the passage of the acts of Congress, giving the right of peremptory challenge to the Government. It was by virtue of the act of 1840, already mentioned, (R. S. sec. 800,) that the Federal courts have been enabled to adopt the laws and usages of the State in respect to the challenging of jurors, whether peremptorily or for cause. (*United States* v. *Shackleford*, 18 How. *supra.*)

When the Federal statute granted the right to a certain number of peremptory challenges to the defendant in criminal cases, it was said that such right must be regarded as excepted out of the power of the court to regulate the same by rule or order under the act of 1840. As the statute prescribed the number of challenges to the defendant, the court could not, therefore, proceed under the act of 1840, and by rule or order prescribe any other number, or none at all, in accordance with the practice of the State courts in that respect. The Federal statute was held to be exclusive of any other regulation on the subject, because to give any other number of challenges to the defendant would be inconsistent with the provisions of the Federal statute, even though the matter of peremptory challenge was provided for by the State practice. In such a case the power to provide by rule of court was to be regarded as excepted from the provisions of the act of 1840.

But, in giving by statute the right of peremptory challenge to the Government in certain cases, it does not necessarily affect the exercise of the power of the Government to challenge in this qualified manner. A conditional or qualified right of challenge is not inconsistent with the existence of the right of peremptory challenge given by statute. The two may co-exist, and the Government may exercise the right of peremptory chal-

lenge given by statute and in the same case exercise the qualified or conditional challenge, as in the case at bar.

It was stated in the opinion in the Shackleford case that unless the laws or usages of the State (adopted by rule by the Federal courts under the act of 1840) allowed it, the right should be rejected, and the practice conformed in that respect to the State law. But in North Carolina the State law permits such qualified right of challenge, and the court in this case made the order to follow the State practice, there being no United States statute on the subject.

In Pennsylvania, which is one of the States where the practice has always obtained, the Supreme Court held that a statute, giving peremptory challenges, does not take away this right of the Government. (*Haines* v. *Commonwealth*, 100 Pa. 317, 322; *Commonwealth* v. *O'Brien*, 140 Pa. 555, 560.)

To the same effect are the decisions in North Carolina. The right remains notwithstanding the enactment of a law giving peremptory challenges to the State. (*State* v. *Benton*, 19 N. C. 196–203; *State* v. *Hensley*, 94 N. C. 1021, [A. D. 1886.])

The courts of Georgia and Florida are of a different opinion. (*Scaley* v. *State*, 1 Ga. 213; *Mathis* v. *State*, 31 Flor. 291, 315.)

We are of opinion that the passage of the acts of Congress, granting peremptory challenges to the Government, has not taken away the qualified right of challenge under discussion in this case. As we have said, there is certainly nothing in the statute granting peremptory challenges to the Government to prevent its exercise of the other kind of challenge when permitted in the State, and where it has been adopted by the Federal court as a rule, or by special order as in this case. The exercise of this right is under the supervision of the court, and it ought not to be permitted to be exercised unreasonably, or so that the interests of the defendant might be unduly prejudiced. The court should take special care to that end.

In this case it appears that neither the Government nor the defendants had exhausted all their peremptory challenges when the jury was obtained. We think it plain that the Government's right of qualified challenge was not unreasonably exercised, and the rights of the plaintiffs in error suffered no injury by the course permitted by the court.

Another question argued arises upon the cross-examination by the district attorney, of the plaintiff in error Adams, who voluntarily became a witness on the trial on his own behalf and in behalf of his fellow-plaintiff in error. The cross-examination referred to the conduct of the witness on a previous voyage and on a different vessel, in regard to which nothing had been said on the examination of the witness in chief.

It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime. (*Fitzpatrick* v. *United States*, 178 U. S. 304.)

It is contended on the part of the plaintiffs in error that within this rule the cross-examination was improper, as the subject-matter of the cross-examination had no tendency to connect the prisoner with the alleged crime for which he was on trial.

The district attorney on his cross-examination began with questions relating to the experience which the witness had had as a seaman, and asked him in regard to the vessels that he had sailed on. It appeared that he had been one of the crew, among others, of the schooner Benefit, for some fifteen months, whose captain was a man named Falkner. He was then asked if during the latter part of the fifteen months he was on the schooner he did not have trouble and try to create insubordination on board that vessel. This question was duly objected to by counsel for defendants, and the objection overruled by the court and an exception allowed. He answered that he was not logged, and then stated that the trouble arose from the cook giving them molasses to make tea, which he said was not right, and he and three other men went to the captain and asked him if he thought it was right, and the captain said they did not have sugar and would have to use molasses. The witness took the tea and threw it overboard; that he never went among the men and tried to create dissatisfaction among them; that the captain never threatened to put him in irons, and when he left the Benefit he shipped on another vessel named the Benj. Russell, where he stayed for over three months.

It is unnecessary in this case to inquire whether the cross-examination was within the prescribed limits, because the witness denied that he had any trouble, or that he had ever tried to create any trouble, or that there was any insubordination on his part on board the vessel named. What he said in regard to the facts showed that there was neither trouble nor insubordination. The Government made no attempt to contradict the evidence of the witness on this subject, and hence there could have been no harm arising from the cross-examination. There are some State authorities which hold that the error, if any, is not cured by answer of the witness denying the charge. But we think the better rule is where, as in this case, it is plain that there is no injury, the exception is not available.

The plaintiffs in error also ask for a new trial because of the remarks made by the district attorney in summing up to the jury, and the action of the court thereon.

In the course of his remarks, and in speaking of the fact that during the time these murders were being perpetrated, one of the plaintiffs in error had testified that he drank some coffee, the district attorney said, "A man under such circumstances who would drink coffee ought to be hung on general principle." This remark the counsel for the plaintiffs in error objected to, and, after hearing counsel on the objection, the court directed the district attorney to confine himself to a proper argument, and thereupon the district attorney expressed his regret if he had made an improper argument, and withdrew the remark.

When the objection was first made by counsel for the plaintiffs in error the court asked if he wanted to cut the district attorney off from making any argument, but thereupon the court immediately directed the district attorney to confine himself to a proper argument, as above stated.

Counsel for the plaintiffs in error objected to both the remarks of the district attorney and the comments of the court as made, and counsel asked to be allowed to file an exception. Upon this request the court replied, "I will give counsel the benefit of his statement that he has made an exception which the court considers frivolous."

The remark of the district attorney was not appropriate argument and should not have been made, but we see nothing more that could have been done than was done by the court as soon as the objection was made by the counsel for the plaintiffs in error. Counsel in summing up to a jury are under some excitement, and may naturally make a remark or statement which is improper. But there is not on that account any ground laid for setting aside a verdict where, as in this case, the court held it was improper, and the counsel withdrew and apologized for it. (*Dunlop* v. *United States*, 165 U. S. 486–498.) Under such circumstances it does seem as if the exception were frivolous, and the court in stating its opinion to that effect is not open to censure.

The error assigned that the court said the plaintiffs in error were not charged with the murder of Coakley, when in fact the bill contained his name, has not been pressed, and we think there is no merit in it. The court said that if charged in the bill there was no evidence to support such charge. Certainly no harm was thereby done the plaintiffs in error.

Upon full consideration of all the objections urged by counsel for the plaintiffs in error, we think no ground appears for granting a new trial. The judgment is

*Affirmed.*

Mr. Justice WHITE dissented.